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No. _____

In The

Supreme Court of the United States

NATHANIEL GRAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 15, 2008

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QUESTIONS PRESENTED

1. Whether an application and order for a Title III wiretap that completely fails to notify the issuing judge that the application had been approved by any specially designated Department of Justice official requires a court to comply with the statutorily authorized suppression remedy or whether it can refuse to comply on the basis of vague, extra-record assurances years after the wiretap order was issued and does such a refusal to suppress affect the fulfillment of the reviewing or approval functions required by Congress?

2. Does the Hobbs Act prohibition on "extortion under color of official right," 18 U.S.C. § 1951, permit the prosecution of private persons, under a conspiracy or aider and abettor theory, as extortion perpetrators, acquiescors, or victims, or does it punish none of them and is the conflict in the circuits caused by the expansion of the Hobbs Act to include conduct not covered by the statute?

PARTIES TO THE PROCEEDING

Petitioner (Defendant and Appellant below):

NATHANIEL GRAY

Represented by: William T. Whitaker and Andrea Whitaker, WILLIAM T. WHITAKER CO., L.P.A., 190 N. Union Street, Suite 301, Akron, Ohio 44304.

Respondent (Plaintiff and Appellee below:

UNITED STATES OF AMERICA

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The opinion of the Court of Appeals (Appendix B) is reported at 521 F.3d 514 (6th Cir. 2008). The decision of the district court denying the petitioner's motion to suppress (Appendix C) is reported at 372 F. Supp. 2d 1025. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for hearing *en banc* (Appendix A) was unreported.

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals filed its opinion on April 2, 2008. That Court denied the petitioner's petition for rehearing and rejected the suggestion for hearing en banc on July 17, 2008. 28 U.S.C. §1254(1) confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The statutory provisions at issue in the instant Petition are:

18 U.S.C. § 2515, Prohibition of use as evidence of intercepted wire or oral communications.

18 U.S.C. § 2518(1)(a), (4)(d) and (10), Procedure for interception of wire, oral, or electronic communications.

18 U.S.C. § 1951, Interference with commerce by threats or violence.

STATEMENT OF THE CASE

Prior to this conviction, Nathaniel Gray was a successful businessman in Cleveland, Ohio. From a beginning as an owner-operator of a small Shell gas station, he built a business that included managing nationwide parking facilities, parking and car rental shuttles and minority and general business consulting and was a member of a number of community boards. (R.600, Ex.1, Apx-1083).

On January 14, 2005, Petitioner Nathaniel Gray was indicted by a grand jury in the United States District Court for the Northern District of Ohio. The Government alleged that Mr. Gray, a private individual, was involved in the "bribery" of public officials. The indictment charged, among other crimes, four counts of conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951 and 13 counts of aiding and abetting substantive Hobbs Act violations. The Hobbs Act allegations centered on Mr. Gray's consulting business and his airport rental car shuttle business in Houston, Texas.

Much of the evidence in the trials derived from Title III wiretaps on Mr. Gray's phones. The first application for a wiretap was presented to the District Court in January, 2002. That application for the electronic wire interception of Mr. Gray's private conversations (and the order permitting the intercepts) admittedly failed to follow the guidelines contained in Title III that require the inclusion of the identity of the specially designated Department of Justice who authorized the application. The application and order made no mention of whether there had been any Justice Department approval. The Government

followed the January, 2002 application for Title III intercepts with four separate applications to continue the intercepts, which were not approved by any specially designated individual at the DOJ. The Government recognized the inadequacy of the post-January, 2002 applications and orders and sealed the interceptions recovered from February 15, 2002 through May 15, 2002. On June 6, 2005, the District Court denied Mr. Gray's motion to suppress the Title III wiretaps. The suppression motion was based on multiple failures to comply with Title III, including the failure to note whether there was an authorizing individual in the application and order. United States v. Gray, 372 F. Supp. 2d 1025 (N.D. Ohio 2005).

The first trial went forward on June 13, 2005 and Mr. Gray was acquitted of seven counts. The jury was unable to reach a verdict on the remaining charges and a mistrial was declared. The retrial began on August 8, 2005. Mr. Gray was acquitted of one count and convicted of all remaining counts. On November 16, 2005, Mr. Gray was sentenced to a general sentence consisting of 15 years for all counts for which there was a conviction. (R.612, Apx-175)

On April 2, 2008, the Sixth Circuit Court of Appeals affirmed the District Court's denial of Mr. Gray's motion to suppress and most of his convictions, including 11 Hobbs Act violations. United States v. Gray, 521 F.3d 514 (6th Cir. 2008). Upon remand for re-sentencing on three reversed charges, the District Court reinstated the same 15-year sentence.

REASONS FOR GRANTING CERTIORARI

This Petition presents two compelling questions that have been the subject of conflict between the circuits and remain undecided by this Court. The Petition unambiguously presents basic questions regarding when suppression is necessitated by the undisputed facial insufficiency of a Title III application and order and what conduct of a private individual is criminalized under the Hobbs Act's prohibition of extortion under color of official right.

The first question is whether an undisputedly facially insufficient application for a Title III wiretap requires suppression under 18 U.S.C. § 2518 (10)(a)(ii). In U.S. v. Chavez et al., 416 U.S. 562 (1974) and U.S. v. Giordano, 416 U.S. 505 (1974), this Court addressed the issue of what constitutes facial insufficiency and distinguished an application and order fails to set forth whether any Justice Department official has approved the application from one that contains a mistake as to which official has approved the application. Embracing that precedent, the 9th Circuit, in United States v. Staffeldt, 451 F.3d 578, 585 (9th Cir. 2006), held, without question, a facial insufficiency requires suppression pursuant to the clear statutory langue of Title III when there is nothing in the order or application identifying the specially designated DOJ official who approved the application or notifying the issuing judge that any approval was obtained. Neither the application nor the order or any attachments to either, in the instant case, made any mention of whether the application had been approved by *any* DOJ official or identified that approval had been obtained. Although application and order in the instant case are indistinguishable from Staffeldt, the

Sixth Circuit chose to disagree and held that the failure to apprise the Court of whether there had been Justice Department approval in the application and order did not require suppression. The Court claimed that Chavez, specifically, left this question open. Gray, 521 F.3d at 526. The resolution of this question and conflict is important and timely.

The second question presented involves conflicts in multiple circuits involving a Hobbs Act issue. This issue began with the expansion of the Hobbs Act, recognized in a concurring opinion by Justice Scalia in 1991:

> ...where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion -- and like all bribery laws I am aware of (but unlike § 1951 and all other extortion laws I am aware of) it punishes not only the person receiving the payment but the person making it.
> United States v. McCormick, 500 U.S. 257, 278-280 (1991).

The Circuit courts are divided in trying to determine what conduct by a private individual aids and abets a Hobbs Act extortion "under color of official right" pursuant to 18 U.S.C. § 1951. Because extortion laws do not punish victims of extortion and because Congress is free to do what it has always done in the past, pass a law criminalizing the bribing of state officials, the circuits have been unable to agree on the conduct necessary to sweep private officials within the orbit of the Hobbs Act under an aiding and abetting or

conspiracy theory of extortion. This Court should finally resolve that conflict.

I. THE COURT OF APPEALS OPINION IN THIS CASE PERMITS THE GRANTING OF A TITLE III WIRETAP ORDER WHEN THE APPLICATION AND ORDER ARE UNDISPUTEDLY FACIALLY INSUFFICIENT WITH RESPECT TO A CRUCIAL CONSIDERATION OF THE ISSUING JUDGE

In its holding in the underlying case, the Sixth Circuit issued a decision that conflicts with the holding of another circuit court on the same important issue of law. In United States v. Staffeldt, 451 F.3d 578, 585 (9th Cir. 2006), the Ninth Circuit found that the complete failure in the application and order for a Title III wiretap to identify that any specially designated approval had been received from the DOJ rendered the application facially insufficient. The Court found that the facial insufficiency was not minor and that it required suppression. In looking at the same facts in Gray, the Sixth Circuit found that suppression was not warranted contrary to the explicit language of the statute. Further, this opinion in Gray decides an important issue of law that has not been settled by this Court. That is whether facial insufficiencies that completely undermine the role of an issuing judge in making the important determination that an application for a Title III wiretap has been properly approved by the DOJ require suppression. The Sixth Circuit made its decision in a manner that conflicts with this Court's decisions in U.S. v. Chavez et al., 416 U.S. 562 (1974) and U.S. v. Giordano, 416 U.S. 505 (1974).

18 U.S. §2510 et seq., otherwise known as Title III of the omnibus crime act of 1968 (and referred to herein as Title III), was enacted to set forth strict procedural mandatory regulations to be followed prior to permitting the Government to intercept the private conversations of the citizens of the United States. One overall purpose of the regulations was to insure judicial oversight and control of the process. Congress signaled its intent about the importance and mandatory nature of these regulations by providing, statutorily, the remedy of exclusion from use in a prosecution intercepts gathered in the absence of compliance with this act. 18 U.S.C. §§ 2515 and 2518 (10)(a). In order to insure judicial oversight, 18 U.S.C. §§ 2518(1)(a) and (4)(d) require that the specially designated official be named in the application and the order.

The Senate report with regard to this bill states that "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." S.Rep. No.1097, 90th Cong., 2d Sess. 66 (1968), U.S. Code Cong. & Admin. News 1968, 2153. See U.S. v. Torres, 751 F.2d 875, 881 (7th Cir. 1984). There must be strict compliance with all of the requirements of Title III. U.S. v. Alfano, 838 F. 2d 158 (6th Cir. 1955), cert. denied 488 U.S. 821. It is undisputed that the Government, in this case, failed to adhere to the requirements and restrictions of Title III. The only dispute was whether that failure required suppression of the evidence obtained. The Sixth Circuit ruled that suppression was not required.

Section 2515 provides that the contents of any intercepted wire or oral communication, and any derivative evidence, may not be used at a criminal trial, or in certain other proceedings, "if the disclosure of that information would be in violation of this chapter." Aggrieved persons may move under § 2518 (10)(a)(ii) to suppress the use of such evidence at trial on the grounds that the order of authorization or approval under which it was intercepted is insufficient on its face.

The importance of the facial sufficiency and the requirement that the issuing judge be notified that a specially designated person approved the application cannot be overstated and was discussed by this Court in U.S. v. Chavez et al., 416 U.S. 562 (1974) and U.S. v. Giordano, 416 U.S. 505 (1974). Giordano and Chavez, and a subsequent line of cases, hold that the omission of the identification of the specially designated DOJ official, a requirement that must be satisfied if wiretapping or electronic surveillance is to be lawful under Title III, is different than a mistake in the identity of the authorizing official, which does not render an application facially insufficient. That analysis makes clear that a failure, such as the one in the present case, in which there was no mention whatsoever about Justice Department authorization permitting application to the Court for permission to conduct the interceptions, requires suppression of the information gleaned from the intercepts.

Chavez establishes that the *misidentification* of the proper individual authorizing the application does not render the application facially insufficient and require suppression. This Court found suppression under § 2518 (10)(a)(ii) (facial insufficiency) unwarranted in

Chavez specifically because "[i]n no realistic sense...can it be said that the order failed to identify an authorizing official who possessed statutory power to approve the making of the application." Chavez, 416 U.S. at 574. In so holding, however, the Court affirmed that an application must be sufficient "on its face." Chavez notes that a misidentification and "failing to identify anyone" are entirely different. Id. at 573. The reason is that misidentification does not render the application or the order insufficient "on its face." The "on its face" language is clear and unequivocal. Id. at 574. A misidentification does "not detract from the facial sufficiency of the order." Id. at 574. When the order fails to identify any person properly authorized pursuant to 18 U.S.C. § 2518(1), it is facially insufficient and vital judicial oversight is annulled. Suppression is mandated.

This Court's companion case, Giordano, further supports the proposition that a complete failure to identify that the application was approved by any individual requires suppression as facially invalid. Although the case did not turn on this particular inquiry, this Court held that the application in Giordano was facially sufficient because the application clearly identified, incorrectly, a specially designated authorizing official. Giordano, 416 U.S. at 509-510. Since a judge examining the application and order on its face could reasonably believe that a duly empowered DOJ official had authorized the wiretap request, the face of the order indicated that the statutory requirements had been satisfied. Id. at 525, n.14.

This Court's clear precedent was correctly followed in United States v. Staffeldt, 451 F.3d 578, 585 (9th

Cir. 2006). In Staffeldt, the Ninth Circuit found that the "facial insufficiency" of the application and order mandated suppression. Staffeldt, 451 F.3d at 579. The Court found that the facial insufficiency made "it impossible for a judge to conclude from the face of the application that it had been authorized by the Justice Department, let alone by a duly empowered Justice Department official." Id. "Because a wiretap application that has not been authorized by the DOJ cannot support the issuance of a wiretap order, the failure of the application to show that it had been authorized could not be considered minor." Id. Further, the Court directly dealt with the cases that have a misidentification rather than a failure to identify. "Unlike the cases...in which the facial insufficiency related only to the identity of the authorizing official in the Justice Department, the facial insufficiency here is far more substantial." Id.

The wiretap application in Staffeldt included as an exhibit a memorandum of authorization from the Department of Justice that the application claimed demonstrated that the request to submit the application was approved by a properly authorized DOJ official. Id. However, the attached memorandum did not relate to the Staffeldt wiretap application and, instead, referenced an entirely different matter. Id. The Court looked to Chavez and Giordano to determine what makes an application insufficient on its face. Staffeldt, 451 F.3d at 582.

> [A] wiretap application is facially sufficient if, on the basis of the information that appears on its face, it could reasonably be believed that it meets all the statutory requirements, including the requirement that a duly empowered Justice

> Department official authorize the application for the particular wiretap being sought, and thus that the wiretap is warranted. If not, the application or order is deemed facially insufficient.
> Id.

The Court found that under Giordano and Chavez, there was no doubt that the application was facially insufficient. "It would be impossible for a reasonable jurist to conclude from the face of the application,... that the request...had been authorized by the Justice Department...As a result, a reading of the application would preclude a determination that all the statutory requirements for approving a wiretap...had been met." Id. at 583.

The Court then went on to determine that the facial insufficiency required suppression. Id. at 584. In making that determination, the Court held that "whether a facial insufficiency is minor [not requiring suppression] relates to the 'distinction[s] in the kinds of information which must be supplied to the approving judge.' Suppression is merited only when the facially insufficient information is 'likely to affect the judge's determination that a wiretap is or is not warranted.'" Id. (internal citations omitted). The facially insufficient portion of the wiretap at issue in Staffeldt relates to "information critical to the judge's determination whether the issuance of the application is warranted...The Supreme Court has held that Justice Department authorization is a 'critical pre-condiction' to the approval of a wiretap application." Id. (quoting Giordano, 416 U.S. at 515-516). The failure to include this information in the application would affect the judge's approval of the application

and, therefore, cannot be considered minor. Id. "Accordingly, the evidence obtained by means of the wiretap must be suppressed." Id.

In the present case, neither the initial application nor the initial order in this case identified the person authorizing the application or even identified whether there had even been such an authorization. In addition, the application on its face was not sworn to. (R.227, Ex. B, Apx-3397.). These facts are undisputed. AUSA David Sierleja, the attorney who presented the application to the issuing judge, confirmed that no evidence of DOJ authorization was given to the issuing judge and stated that he did not remember exactly what he had told the Judge to whom the application was made. (5/9/05Tr.5-6, Apx.1226-1227.) The Government followed this failed application and order with four similar consecutive applications that were made without any DOJ official approval whatsoever.[1]

In denying the motion to suppress the Title III intercepts, the Trial Court noted that this case raised Title III issues that neither the Supreme Court nor the Sixth Circuit have ever ruled upon. Gray, 372 F.Supp. at 1036. The Sixth Circuit came to the same conclusion. Gray, 521 F.3d at 526.

The Sixth Circuit found that the facial insufficiency, the failure in both the application and the order to identify any authorizing individual or notify the issuing judge that any authorization had

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[1] Those orders and applications are not a part of this record because the District Court denied Mr. Gray's request to compel their production. (R.277, Apx-297.)

been granted, was a "minor" error not requiring suppression. Gray, 521 F.3d at 526. This holding is clearly in conflict with Staffeldt as well as this Court's decisions in Chavez and Giordano. The failure of the application and the order to show Justice Department authorization is "not a minor issue" but is a "factor essential to the issuance of a warrant – that the application for the wiretap has been authorized." Staffeldt, 451 F.3d at 585. Suppression is merited here because the facially insufficient information is 'likely to affect the judge's determination that a wiretap is or is not warranted.'" Id. As in Staffeldt, the facially insufficient portion of the wiretap at issue here relates to "information critical to the judge's determination whether the issuance of the application is warranted...a 'critical pre-condiction' to the approval of a wiretap application." Id. (quoting Giordano, 416 U.S. at 515-516).

The Court below incorrectly determined that Staffeldt was distinguishable from the present case because the issuing judge had notice that a "specially-designated" official had approved the application. Gray, 521 F.3d at 526. This argument is unsupported by the law and by the facts of this case. First, it is legally incorrect. The alleged notice received by the issuing judge was not in the application or the order nor was it attached in any letter or memorandum included with the application. It was wholly irrelevant to determining the facial sufficiency of the application and order. Instead, the notice to which the Court refers is testimony years later from the AUSA who submitted the application to the Judge. In the hearing on the motion to suppress the wiretaps, AUSA Sierleja testified that he vaguely remembered the conversation with Judge Oliver as follows,

> And during that conversation I had explained to him what we had done early on in the investigation to get to the point where we had submitted the application to OEO that they reviewed it, that there was a review process and ultimately an approval for that before we submitted anything to him. (5/09/05 Tr., p.5, Apx-1226)

The Sixth Circuit found that this unsworn statement by AUSA Sierleja to the issuing judge, prior to the actual submission of the affidavit, provided notice so that the facial insufficiency of the application and order were minor. Gray, 521 F.3d at 526-527. Regardless of whether this conversation could even be properly considered, it provides no information relevant to the determination of whether the facial insufficiencies are minor or require suppression. Even if AUSA Sierleja had actually verbally identified the specially-designated Justice Department official who provided proper authorization for the application, an off the record conversation with the Judge does not support an application that is, on its face, insufficient. Further, it does not transform critical facial insufficiencies into minor ones no longer requiring suppression.

In fact, the Staffeldt Court makes clear from a transcripted excerpt of the argument that neither the Court nor the Government there believed that an oral representation by the applying attorney would be sufficient to fix the facial insufficiencies or to avoid suppression. Staffeldt, 451 F.3d at 583, n.7. The Court asked whether it would have been proper to issue the order if the applying attorney had said "we did in fact get the permission of the Department of Justice." The

Government responded that *it would not have been sufficient* and it (the Government) would have had to get the proper written authorization and attach it to the application. This is also supported by the decision in United States v. Ford, 414 F. Supp. 879, 884-885 (D.C. Cir. 1976), aff'd by 553 F2d 146 (D.C. Cir. 1977), which held that conversations between an attorney applying for wiretap and the Judge issuing the wiretap order could not be relied upon to supplement the record. Here, the Government failed to make a record of any conversations that may have taken place on January 16, 2002. Whether or not the testimony is reliable, it cannot solely support a finding that the undisputed facial insufficiencies are minor.

As noted in Staffeldt, the application must contain the information that Justice Department approval for the application has been obtained because it is information which is "critical to a judge's determination whether the issuance of the application is warranted;" it is a "critical pre-condition." Staffeldt, 451 F.3d at 584.

Moreover, the Sixth Circuit's opinion is contrary to this Court's holdings in Chavez and Giordano and in conflict with the Ninth District's holding in Staffeldt because, in fact, the issuing judge had no notice that a "specially-designated" official or any approval consistent with the requirements of Title III had been given. The conversation with AUSA Sierleja does not provide the required notice of this essential fact. Legally, it does not provide the information required by Title III. His statement is woefully insufficient for an issuing Judge to determine that a "specially-designated" official or any approval consistent with the requirements of Title III had been met.

Further, the purpose of requiring facial sufficiency and judicial oversight of the application process is to ensure that issuing judge has the information he needs to make the determination regarding the wiretaps. That facial sufficiency of the application and order is paramount is clearly articulated by § 2518 (10)(a)(ii)'s provision that it is one of the three statutorily authorized avenues for seeking suppression. It is the facial sufficiency of an application that allows the issuing judge to determine that a specially-designated individual at the DOJ approved the application and that, either by name or title, responsibility can be traced to that person. The very purpose of judicial supervision contained in Title III is "to limit and restrict the scope of wiretapping or eavesdropping by requiring that it be carried out under the strictest judicial supervision." United States v. Cox, 449 F.2d 679, 685 (10th Cir. 1971). The facial sufficiency of the application is primary means of facilitating that judicial supervision. Refusing to suppress a wiretap that was approved on the basis of a facially insufficient warrant and, therefore, without the full vetting provided for with a facially sufficient application flouts the importance of the facial sufficiency and judicial oversight that Congress found essential to the Title III process.

II. THE OPINION OF THE COURT OF APPEALS AS TO THE HOBBS ACT PROSECUTIONS FOR EXTORTION UNDER COLOR OF OFFICIAL RIGHT AS APPLIED TO A PRIVATE INDIVIDUAL RELIES ON FACTS THAT NO OTHER CIRCUIT COURT HAS FOUND DISPOSITIVE AND EVIDENCES THE CONFUSION AMONG THE CIRCUITS REGARDING WHAT CONDUCT OF A PRIVATE INDIVIDUAL IS PROSCRIBED BY THE STATUTE

The circuit courts continue to struggle with what, if any, conduct of a private individual is punishable by the Hobbs Act, 18 U.S.C. § 1951, under the "color of official right" prong of the statute. The decision by the Court of Appeals in the instant case exemplifies that struggle as it conflicts with the decisions of several other circuit courts on the important issue of what conduct of a private individual is criminalized when a public official extorts things of value under color of official right. The Sixth Circuit has adopted bright line rule, a private individual is only punishable when it is not his own money that is being extorted, that conflicts with the decisions of other circuits and also marks a significant shift from its own most recent case on this issue that was also in conflict with other circuits. Moreover, this important question of federal law has been largely unanswered by this Court. This question should be settled in order to permit the circuits to apply a workable rule. If this Court declines to consider this question, conduct that is not criminalized in one circuit will be in another.

18 U.S.C. § 1951 prohibits extortion and, in relevant part, defines extortion as the "obtaining of property from another, with his consent,...under color of official right." Since private individuals cannot act "under color of official right," the parameters of what is embraced by the statute has been a moving target for many years. Various courts have held that the relevant inquiry was the level of involvement of the private individual. That is, whether or not the individual was a passive victim or acquiecsor or an active participant. The Sixth Circuit has held that a person whose own money was extorted can never be an aider and abettor of their own extortion regardless of his level of participation. The Sixth Circuit has further held that the Hobbs Act punishes no private individual as bribery perpetrators, acquiescors, or victims. It is that rule that must be applied to the confusion from the Circuits and, when honestly applied to Mr. Gray's Hobbs Act convictions, necessitates a reversal of his convictions.

The cases holding that the involvement of the private individual determines culpability include the First, Second and Fourth Circuits. However, none of these circuits have articulated a definable rule about what conduct crosses the line, from being a victim or acquiescor into an aider or abettor but have all found that such a line existed, albeit a different line, in each of the cases their cases. In United States v. Cornier-Ortiz, 361 F.3d 29 (1st Cir. 2004), the Court examined a case where Mr. Cornier-Ortiz, a private individual, was convicted of aiding and abetting extortion by a public official. Mr. Cornier-Ortiz provided the public official with how own money in exchange for certain lucrative contracts. His defense was that he was the victim of the extortion and, therefore, could not be

convicted of aiding and abetting his own extortion. Id. at 39.

The Court noted that "some case law suggests that mere acquiescence to an extortioner's demand for payments may not be criminal under 18 U.S.C. § 1951..." Id. The Court then held that a victim of extortion can "cross the line into illegal behavior if he engages in more active conduct than simply agreeing to pay the extortioner." Id. at 40. But, the Court did not identify why type of "active conduct" was necessary. Instead, it stated

> ...we need not delineate the precise location of the 'line at which a payor's conduct constitutes sufficient activity beyond mere acquiescence of a victim.' United States v. Spitler, 800 F.2d 1267, 1278 (4th Cir. 1986). Wherever that line is drawn, there was sufficient evidence here to conclude that Cornier was on the wrong side of it.
> Cornier-Ortiz, 361 F.3d at 40.

The Court based this conclusion on the fact that the defendant benefited from the "quid pro quo" arrangement and that he "did more than merely acquiesce to it." Id. at 40. The defendant and the public official "were working together, not against one another. The two men looked out for each other and for each other's future." Id. at 41.

In United States v. Tillem, et al., 906 F.2d 814 (2nd Cir. 1990), the Second Circuit reversed Hobbs Act convictions of Defendant Campbell. There, Campbell was retained by restauranteurs to help them pass health inspections and received a total of $250,840 in

retainers from the "victim" of the extortion. Id. at 819. He was originally convicted of aiding and abetting the health inspectors' (public officials) extortion for making "payments regularly to guarantee that his client's restaurants would pass inspection." Id. at 820. In granting Campbell's motion for bond on appeal, the District Court stated that the "real issue to be raised on appeal is whether this defendant, who is an restaurant consultant, was simply a briber or was an aider and abettor of an extortionist and this is not a frivolous question." Id. In reversing his aiding and abetting convictions based on the insufficiency of the evidence, the Second Circuit found that Campbell

> operated as a conduit though which the [public officials] extorted money from restauranteurs...It does not prove that Campbell was an aider and abettor of the extortion conspiracy because, even viewing the evidence in favor of the government, a reasonable jury could not find that Campbell himself promoted the conspiracy and had a stake in its outcome.
> Id. at 823.

The Court's inquiry focused on determining whether Campbell's involvement went beyond victim and passive compliance to active participant. Id. The Court specifically found that the fact that the money came indirectly from Campbell's clients and not his own pocket to support the reversal, although did also refer to him as a victim of the extortion. Id. at 823-824. Campbell's willing participation and expectance of favors for his clients was seen by the Court to only establish "his culpability as a 'briber'." Id. at 823. Because Campbell did not "*initiate* a 'symbiotic

relationship' between the victim-his client restaurants-and the corrupt government officials...who extorted money from Campbell...," he was not an aider and abettor of the extortion. Id at 824. The Court found that Campbell fit precisely into a warning contained in Spitler, which cautioned that its "holding be limited to the facts of that case because reading it as a 'rule of general applicability might criminalize under the Hobbs Act conduct which...may...be conduct of a victim succumbing to a climate of unstated prerequisites of doing business with particular public officials or departments.'" Id. at 824 (quoting United States v. Spitler, 800 F.2d 1267, 1278, n. 6 (4th Cir. 1968)).

The Second Circuit's opinion in United States v. Stolfi, et al., 889 F.2d 378 (2nd Cir. 1989) attempts to resolve a similar question without, again, defining where the line between victim and perpetrator lies. The defendants were convicted of aiding and abetting a Hobbs Act violation when they passed on a payment from a company to a carpenter's union to end its threatening behavior. Although the Hobbs Act violation did not involve a public official, the Court examined the difference between a victim, or a "steerer" ("someone who merely acts as a conduit between the extortioner and the victim"), and an aider and abettor. Id. at 381. To succeed on a theory of aiding and abetting, the government must "show that appellants 'associated themselves' with the carpenters' criminal venture, participated in it as something they wished to bring about, or sought by their action to make it succeed." Id. (citing United States v. Clemente, 640 F.2d 1069, 1078-80 (2nd Cir. 1981) (finding the "controlling issue" "whether sufficient evidence was introduced at trial for the jury to conclude that [the

defendant] purposively sought to make the kickback scheme succeed."); United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938)). The Court found that the "knowing participation as intermediaries is more purposeful than the participation of the "steerer" in Clemente, who merely advised the victim concerning a pay-off. Because [the defendants] unmistakably sought to make the extortionate scheme succeed," their convictions were affirmed. Id.

Although not dealing with the "under color of right" prong of the Hobbs Act, the Second Circuit, in United States v. Capo, 817 F.2d 947 (2nd Cir. 1987), reversed Hobbs Act convictions because the convictions were "intrusions by federal officials into areas properly left to state enforcement." Id. at 955. In so doing, the Court discussed the danger of such an intrusion,

> Exercising that duty, we find it necessary to nullify this attempted application of the Hobbs Act to circumstances it was never meant to reach. Incremental extensions of federal criminal jurisdiction arguably present a more pernicious hazard for our federal system than would a bold accretion to the body of federal crimes. At a minimum, a clear extension of federal responsibility is likely to be sufficiently visible to provoke inquiries and debate about the propriety and desirability of changing the state-federal balance. Less abrupt, more subtle expansions, however, such as nearly occurred here, are less likely to trigger public debate, and, yet, over time cumulatively may amount to substantial intrusions by federal officials into areas properly left to state enforcement. By holding that the Hobbs Act does not encompass

> state-law commercial bribery, we seek to demarcate a point beyond which congress intended federal prosecutors not to pass.
> Id.

The case also accentuates the issue of who is a "victim" of extortion. There, the "victims" (as they were referred to, in quotes, by the Court) were individuals who sought to pay a bribe to someone would could help them get a job at a good company. These "victims" clearly sought out this opportunity and did not merely acquiesce to the payment of the money. Reversed on other grounds, the "victim" label for these individuals is seemingly contrary to other interpretations. A finding in direct conflict with Gray.

The Fourth Circuit's Spitler opinion also focuses its analysis on the level of participation of the alleged aider and abettor/conspirator to a public official's extortion. Spitler 800 F.2d at 1277. The Court specifically questioned "the soundness" of the government's assertion that the defendant could not be a victim because the things of value came from defendant's company and not from him. Id. at 1275. The Court rejected this assertion because it believed that focusing on the source of the things of value would punish conduct that Congress chose not to criminalize. Id. at 1275.

Instead, the Court chose not to focus on from where the money or things of value came but on the level of involvement of the defendant. The Court examined the defendant's position that a victim could not be prosecuted. This inquiry began in the same manner that many courts making that inquiry begin- looking at Gebardi v. United States, 287 U.S. 112 (1932). This

Court overturned Gebardi's conviction for conspiring in her own transportation over state lines in violation of the Mann Act. Since the Mann Act was designed to protect woman who were forced to consent, that consent could not be the basis of an aider or abettor or conspiracy conviction. Spitler, 800 F.2d at 1275. It is from the premise that a statute does not intend to punish the conduct of the "victim" it is meant to protect that the Second Circuit's analysis flows.

> Consistent with this notion, the Hobbs Act, like the Mann Act construed in Gebardi, may be interpreted as not intended to punish the 'victim' of the crime. The legislative history of the Hobbs Act, moreover, indicates that Congress intended to punish 'those persons who have been impeding interstate commerce and levying tribute from free-born Americans engaged in interstate commerce.' H.Rep. No. 238, 79th Cong. 2d Sess. 1946), *reprinted in* 1946 U.S. Code Cong. Serv. 1360, 1370. Such legislative history and the statute's prescription of punishment solely for the extortioner indicates that Congress may not have intended to criminalize the acquiescence of extortion victims. Gebardi, *supra*. *See also* United States v. Nelson, 486 F.Supp 464, 490 (W.D. Mich. 1980). When an individual protected by such legislation exhibits conduct more active than mere acquiescence, however, he or she may depart the realm of a victim and may unquestionably be subject to conviction for aiding and abetting and conspiracy. We derive such conclusion again from Gebardi, wherein the Court, relying on United States v. Holte, 236 U.S. 140 (1915), observed that where the

> woman's conduct is 'more active than mere agreement on her part to the transportation,' 287 U.S. at 119, and where she is 'the active or moving spirit in conceiving or carrying out the transportation' she is not a victim, but an accomplice. Id. at 117-18.
> Spitler, 800 F.2d at 1276

The Court then went on to determine "the degree of activity necessary" for a person to cross the line from victim to perpetrator. Id. at 1277. Once again, the Court did not develop a test for where that line exists but instead found that it "need not paint with a broad brush and declare a bright line at which a payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim so as to subject him to prosecution as an aider and abettor or a conspirator." Id. at 1278. Rather, it determined that the defendant could not be "deemed a mere victim" of the public official's extortion. Id. The Court found that the defendant's active involvement "constituted a 'far more active role...in *addition* to the mere payment of money.'" Id. at 1278 (quoting United States v. Johnson, 337 F.2d 180 (4th Cir. 1964), *aff'd*, 383 U.S. 169 (1966)). In making its holding, the Court stated that the reason it did not create a bright line rule was because declaring a "rule of general applicability might criminalize under the Hobbs Act conduct which, for example, may constitute 'active solicitation and procurement,' see Nelson, 486 F.Supp. at 491, but may nevertheless be conduct of a victim succumbing to a climate of unstated prerequisites to doing business with particular public officials or departments." Spitler, 800 F.2d at 1278, n. 6.

The cases discussed above that hold that the only relevant inquiry is the degree of participation of the private individual and that that is what transforms him from a victim to an aider and abettor are in direct conflict with the Sixth Circuit's holdings in Gray and Brock. United States v. Brock, 501 F.3d 762 (6th Cir. 2007) was a multi defendant case involving prosecutions under the Hobbs Act, 18 USC § 1951, among other statutes. Michael and Jerry Brock owned a bail bond company, Brock Bonding, in Chattanooga, Tennessee. Brock, 501 F.3d at 764. In May of 2001, one of the Brock Bonding clients failed to appear, which would have normally resulted in the company having to pay the bond. Id. at 765. Jerry Brock had a friend who was a supervisory clerk for the criminal division of the county courthouse, Scott Simcox. Id. J. Brock approached Mr. Simcox and requested help to "make [the problem] go away." Id. Mr. Simcox did this by removing the scheduled forfeiture hearing from the court's calendar. Therefore, the bond was never ordered to be forfeited. Id. Thereafter, Mr. Simcox removed twenty-four scheduled forfeiture hearings for clients of Brock Bonding that fled the county. Id. Mr. Simcox was paid 10% of the face value of the bond from Brock Bonding. Id.

The Court determined that the Brocks' conduct could not result in conviction under the Hobbs Act because the "language of the Hobbs Act does not prohibit bribery either directly or indirectly through the contortion of an extortion conspiracy." Id. at 768. The Court also found that the Brocks could not be convicted under the Hobbs Act because they did not "obtain property from another, with his consent." Id. at 767. The Court noted that the language of the Hobbs Act requires that the defendant must have "formed an

agreement to obtain property from someone outside the conspiracy." Id. The Court found that the money was all from people inside the conspiracy and, therefore, any conduct related to its exchange was not covered by the Hobbs Act.

The Court found that "neither the Supreme Court nor our court has construed the statute to cover private individuals who *offer* a bribe to public officials. Congress knows how to prohibit the giving or offering of bribes directly." Id. at 768. The Court further noted, having "opted not to punish the giving of bribes directly, Congress should not be treated as having prohibited them through the slight of indictment of an extortion conspiracy." Id.

> [E]ither the [Hobbs] act picks up all perpetrators, acquiescors, victims, or it picks up none of them. We say it picks up none of them and would leave it to Congress (if it wishes) to do what it has done before: Make it a crime to offer or give a bribe to a public official.
> Brock, 501 F.3d at 771

This clear, unequivocal statement was a long awaited heeding of this and other Court's concerns regarding the expansion of the Hobbs Act. *See* Justice Scalia's admonition regarding the Hobbs Act in United States v. McCormick, 500 U.S. 257, 278-280 (1991). *See also*, Evans v. U.S., 504 U.S. 255, 291 (1992), Thomas, C., dissenting (discussing federalism: "the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws -- acts of public corruption by state and local officials."); U.S. v. Pritchett, 496 F.3d 537, 552 (6th Cir. 2007), Cook, J

dissenting (but 'since Congress can enact foolish statutes, as well as wise ones', courts must not substitute 'wiser' judgment for that of Congress.") Justice Scalia noted that most Courts are not impressed by the expansion of the Hobbs Act to include, as extortion, the acceptance of private money by public officials. McCormick, 500 U.S. at 278-280. The distinction between bribery, essentially voluntary, and extortion, essentially requiring duress, continues to cause problems. As noted by Justice Scalia:

> ...where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion -- and like all bribery laws I am aware of (but unlike § 1951 and all other extortion laws I am aware of) it punishes not only the person receiving the payment but the person making it.
> McCormick, 500 U.S. at 278-280.

The Brock Court specifically noted that other cases (including some that have been identified herein) have discussed whether the Hobbs Act could be "extended to the 'victim' of an extortion scheme (the giver of the bribe), as opposed to the public official (the taker of the bribe), under a conspiracy theory or an aiding and abetting theory...The cases suggest that perpetrators of extortion schemes may be treated as Hobbs Act conspirators or aiders and abettors, but victims may not be." Brock, 501 F.3d at 770. The Court correctly noted that

> [n]othing in the statute, however, creates any such dichotomy, and indeed none of the cases looked to the statute to come up with this

> distinction. The statute refers to the "obtaining of property from another, with his consent, . . .under color of official right." 18 U.S.C. § 1951(b)(2). It thus is not extortion, but robbery, if the victim gives the property without consent; all victims of extortion must consent to give the money to the public official. Why, under these circumstances, bribers of public officials are necessarily perpetrators of Hobbs Act violations rather than Hobbs Act victims, how the distinction matters to the statute and what the line is between the two are questions these cases never answer.
> Brock, 501 F.3d at 770.

The Brock Court correctly holds that since Congress has

> opted not to punish the giving of bribes directly, Congress should not be treated as having prohibited them through the sleight of indictment of an extortion conspiracy. Indeed, under the government's theory of prosecution, it is difficult to see what independent role these other federal statutes play. This is, in short, the seventh degree of separation.
> Brock, 501 F.3d at 768.

There was no discussion of the degree to which the person paying the money was involved or their level of participation. Moreover, the facts in Brock make it clear that it was the private individual who approached the public offic al. Brock, 501 F.3d at 76. This is conduct that the First, Second and Fourth Circuits would have clearly found crossed "the line" from victim to active perpetrator.

The Sixth Circuit's holding in Gray is also in conflict with the First, Second and Fourth Circuits in that, again, it does not look to the level of involvement of the participant but to whose money is being used. The only inquiry by the Sixth Circuit is whether Mr. Gray used his own money or that "of another." Gray, 521 F.3d at 535-540. This creates an untenable conflict with Tillem, Cornier-Ortiz, Stolfi, and Spitler. This confusion is created because the Sixth Circuit was correct in Brock that the distinction drawn in those cases is not supported by the statute and the only way to correctly interpret the Hobbs Act is to find that it does not pick up any victims, acquiescors or perpetrators. The Sixth Circuit's holding in Gray misapplies that correct holding when it looks solely to the source of the money, a standard that no other court has found dispositive. Gray, 521 F.3d at 535-540. Further, the Court does not articulate why it has abandoned its holding that the Hobbs Act does not pick up any victims, acquiescors or perpetrators. Because the Sixth Circuit found that Mr. Gray used his own money in only three Hobbs Act counts, those are the only counts reversed by the Court of Appeals. Id.

Further, the distinction drawn by the Sixth Circuit in Gray to differentiate it from Brock creates another conflict with Tillum. The Sixth Circuit affirmed the majority of Mr. Gray's Hobbs Act convictions on the assertion that the money provided to the pubic officials was not that of Mr. Gray.[2] That is, that the money

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[2] This distinction, however, creates another problem. The Brock Court made it clear that the property must be obtained with their consent. There was no testimony in the trial that the money

was "of another," the companies for whom Mr. Gray was a consultant. It was that distinction alone that allowed his conviction on the Hobbs Act counts to stand. The Court reversed three Hobbs Act counts because there was no evidence that the money came from anyone other than Mr. Gray. Because the money was not from another outside the conspiracy, there could be no Hobbs Act extortion. Gray, 521 F.3d at 535-540.

In Tillem, Defendant Campbell was a consultant receiving a retainer working for businesses that benefited from the help of the public official, as was alleged in Gray. However, that fact produced just the opposite result there. The Court specifically found that the fact that the money came indirectly from Campbell's clients and not his own pocket *supported the reversal* of his conviction. Tillem, 906 F.2d at 823-824. The Court also found it significant that Campbell never told the victims of the scheme that he had authority from the public official to collect money from the victims on behalf of the public official. Id. 823. Campbell's willing participation and expectance of favors for his clients was seen by the Court to only establish "his culpability as a 'briber'." Id. at 823. This is factually indistinguishable from Gray. In Gray, representatives from the companies for whom Mr. Gray consulted testified that they were not informed or told by Mr. Gray that he was collecting money on behalf of the public officials. The Sixth Circuit held that the only money that was received by state officials came from, what could only be characterized, at best,

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provided to the public official was with the consent of the company the Court determined provided it.

as acquiescors or co-conspirators. Gray, 521 F.3d at 535-540.

If the Sixth Circuit was correct and the money was from the companies for which Mr. Gray worked, this is not property of another as required by Brock. As Brock makes quite clear, money coming from an "acquiescor" or a "co-conspirator" is not money "from another." It must be property from an unrelated entity outside the conspiracy. Brock, 501 F.3d at 769. Further, the simple fact that the money was from the companies for whom Mr. Gray works creates a wholly different result in Tillum.

Finally, the confusion in this area goes to the heart of what Justice Scalia noted in McCormick. That is, punishing the state law crime of bribery through the Hobbs Act is an expansion of the Act. In this matter, when addressing the jury instructions and the Hobbs Act, the Sixth Circuit held that the Government's and District Court's continuous reference to bribery, something that many courts and Justice Scalia have made clear cannot be punished by the Hobbs Act, was "fleeting" and used as a shorthand way of referring to certain of the Hobbs Act charges in the indictment. Gray, 521 F.3d at 541. It is difficult to fathom how describing a crime with "shorthand" that is legally incorrect and invites a jury to convict for conduct that cannot be punished under the Hobbs Act is trivial or harmless. The Government, its witnesses and the District Court used the term bribery on 43 occasions.

In McCormick, Justice Scalia wrote a concurring opinion that questioned the previously unexamined expansion of the Hobbs Act, using the "under color of official right" language, into areas that were previously

only covered by state bribery laws. 500 U.S. at 277. Justice Scalia begins by noting that when "it first occurred to federal prosecutors to use the Hobbs Act to reach what was essentially the soliciting of bribes by state officials, courts were unimpressed with the notion. They thought that public officials were not guilty of extortion when they accepted, or even when they requested, *voluntary* payments designed to influence or procure their official action." Id. It was many years before any court applied the Hobbs Act to bribery. Id. at 278. Thereafter, the courts "the Courts of Appeals accepted the expansion with little disagreement... and this Court has never had occasion to consider the matter." Id. He further wrote that "[i]t is acceptance of the assumption that 'under color of official right' means 'on account of one's office' that brings bribery cases within the statute's reach...That assumption is questionable." Id. Previously, "[a]n official charged with extortion could defend on the ground that the payment was voluntary and thus he was guilty only of bribery." Id. at 279.

This distinction is important because

> where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion -- and like all bribery laws I am aware of (but unlike § 1951 and all other extortion laws I am aware of) it punishes not only the person receiving the payment but the person making it. See 18 U.S.C. § 201(b) (criminalizing bribery of and by federal officials)... McCormick, though not a federal official, is subject to federal prosecution for bribery under the Travel Act, 18 U.S.C. § 1952, which criminalizes the use of

> interstate commerce for purposes of bribery -- and reaches, of course, both the person giving and the person receiving the bribe.
> Id. at 279-280.

Justice Scalia's question must be answered. Is there any statutory support for prosecuting through the Hobbs Act what has always been considered bribery? It is clear that the attempts to fit this conduct into the Hobbs Act have led to the confusing and conflicting holdings in the circuit courts discussed herein. Such expansion of the Hobbs Act cannot be continued. This Court cannot continue to make distinctions in a federal "payment for official action" statute when that the statute does not exist in that form.

Finally, what is most important is that the conflict about what factors make a private individual culpable under the Hobbs Act demonstrates the difficulty in creating a line that is not clearly drawn by or supported by the statute. It is Brock that states the most workable and statutorily supported rule. That is, the act picks up no victims, acquiessors or perpetrators regardless of whether they are prosecuted under an aider or abettor or conspiracy theory and Congress can make the decision to punish that conduct if it so chooses. If that rule is honestly applied to Gray, his conviction on the Hobbs Act counts must be reversed. It is this Court that must establish this rule and end the confusion and conflict among the circuits in attempting to apply the Hobbs Act to punish a state law crime.

CONCLUSION

The Petitioner presents compelling and important issues of law that represent conflicts in the circuits and address matters currently unaddressed by this Court. This Court's intervention in both of these matters is necessary to resolve the conflicts and provide clear guidance to the lower courts on these significant legal questions. For the foregoing reasons, Petitioner urges this Court to accept certiorari on both questions presented.

Dated: December 15, 2008

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 05-4482/06-3209

[Filed July 17, 2008]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
NATHANIEL GRAY, Defendant-Appellant.	)

ORDER

BEFORE: GILMAN, GIBBONS, and GRIFFIN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/_____
Leonard Green
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 05-4482; 06-3086/3209

[Filed April 2, 2008]

Nos. 05-4482; 06-3209

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

NATHANIEL GRAY,
Defendant-Appellant.

No. 06-3086

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GILBERT JACKSON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Ohio at Cleveland.

No. 04-00580—James S. Gwin, District Judge.

Before: GILMAN, GIBBONS, and GRIFFIN, Circuit Judges.

OPINION

GRIFFIN, Circuit Judge. In these consolidated appeals, defendants Nathaniel Gray and Gilbert Jackson appeal their jury trial convictions on multiple counts of violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d); conspiracy to obstruct and obstruction of interstate commerce by extortion in violation of the Hobbs Act, 18 U.S.C. § 1951; and "honest services" mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 1346. Gray also pleaded guilty to one count of income tax evasion, 26 U.S.C. § 7201. Defendants' convictions stem from their alleged schemes to procure government contracts for corporate clients and financial gains for themselves by illicitly providing money and gifts to public officials in exchange for political influence in the bid for municipal contracts.

The paramount common issue raised by both defendants is whether certain evidence obtained through court-authorized electronic surveillance pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III" or "the Act"), 18 U.S.C. §§ 2510-22, was properly admitted at trial and, concomitantly, whether the district court abused its discretion by refusing to require disclosure of certain illegally intercepted conversations of defendants. Jackson and Gray also challenge the viability of their Hobbs Act convictions in light of our recent decision in *United States v. Brock*, 501 F.3d 762

(6th Cir. 2007). In addition, defendants raise numerous other issues in these appeals, including, *inter alia*, challenges to the sufficiency of the evidence; the district court's denial of motions for severance, continuance, and mistrial; prosecutorial misconduct; claims of error in jury instructions; and cumulative error. Gray also appeals his sentences imposed under the advisory Guidelines.

For the reasons stated below, we reverse Gray's convictions on Counts 30, 31, and 41 of the superseding indictment but affirm his convictions and sentences on all remaining counts. With regard to Jackson, we reverse his conviction on Count 41 but conclude that the remainder of his assignments of error are without merit and affirm his convictions on all other counts. Accordingly, we affirm in part, reverse in part, and remand these cases to the district court for resentencing consistent with this opinion.

I.

Nathaniel Gray was a businessman based in Cleveland, Ohio, who, during the relevant time period related to this prosecution, operated a consulting firm, ETNA Associates, Inc., and several other businesses. Gilbert Jackson was a senior vice-president, involved in marketing and business development, in the New Orleans office of Camp, Dresser & McKee ("CDM"), a national design and engineering firm that specializes in wastewater treatment facilities. In addition to his job with CDM, Jackson independently conducted business as a consultant with Gray. Gray received monthly payments from CDM and other corporate clients, including Honeywell, and in turn paid Jackson a monthly fee of $2,500 or more. In the mid-1990's,

defendants, along with other individuals, began to engage in a series of discrete transactions that allegedly involved the unlawful payment of cash and gifts to public officials in four cities – Cleveland and East Cleveland, Ohio; Houston, Texas; and New Orleans, Louisiana – for the purpose of steering municipal contracts to defendants' corporate clients.

A lengthy investigation by the government into defendants' activities ensued. The investigation, which utilized electronic and video surveillance authorized by a federal district court pursuant to Title III, culminated in January 2005 with the issuance by a grand jury of a 45-count superseding indictment charging Gray and Jackson, along with four other individuals, with violations of RICO, the Hobbs Act, and mail and wire fraud statutes. Gray was also charged with one count of tax evasion.

Codefendants Monique McGilbra, Brent Jividen, and Ricardo Teamor entered into plea agreements with the government, thus leaving Gray, Jackson, and coindictee Joseph Jones, a Cleveland City Councilman, to stand trial. A June 2005 jury trial against these defendants in the District Court for the Northern District of Ohio ended in a mistrial after the jury was unable to reach a verdict on some of the charges. The district court ordered an immediate retrial, which began on August 8, 2005. Jones entered a guilty plea on the third day of trial; thus, the trial proceeded against the present defendants, Gray and Jackson.

On August 17, 2005, the jury found Gray guilty of one count of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity (RICO conspiracy), in violation of 18 U.S.C. § 1962(d)

(Count 1); three counts of conspiring to obstruct interstate commerce by extortion (Hobbs Act conspiracy), in violation of 18 U.S.C. § 1951(a) (Counts 2, 26, and 41); twelve counts of obstructing interstate commerce by extortion (substantive Hobbs Act violations), contrary to 18 U.S.C. § 1951(a) (Counts 3-9 and 27-31); and twenty counts of honest services mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 1346 (Counts 10-15, 20, 22, 32-40, and 42-44).[1] Gray entered a plea of guilty to tax evasion (Count 45), in violation of 26 U.S.C. § 7201, a charge that had been severed from the primary trial.

The jury convicted Jackson on one count of RICO conspiracy (Count 1); two counts of Hobbs Act conspiracy (Counts 26 and 41); one count of a substantive Hobbs Act violation (Count 28); and four counts of honest services mail and wire fraud (Counts 37 and 42-44). The jury acquitted Jackson on eight counts of mail and wire fraud (Counts 32-36 and 38-40).

Following the jury verdict, defendants moved for a judgment of acquittal and/or new trial under Federal Rule of Criminal Procedure 29. The district court denied defendants' motions. *See United States v. Gray*, Docket No. 1:04CR580, 2005 WL 3059482 (N.D. Ohio, Nov. 15, 2005) (unpublished).

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[1] During the first trial, jurors acquitted Gray on four counts of honest services mail and wire fraud (Counts 16-19), and the district court granted Gray's motion for judgment of acquittal on a Hobbs Act conspiracy count (Count 23), a substantive Hobbs Act count (Count 24), and a mail fraud count (Count 25). At the second trial, the district court dismissed Count 21 (honest services and mail fraud) as to Gray.

The district court sentenced Gray to 180 months of imprisonment on the RICO and Hobbs Act counts and to 60 months of imprisonment on the tax evasion and fraud counts, with all sentences to be served concurrently. The court ordered Gray to pay $1,587,000 in restitution and $3,700 in special assessments. Jackson was sentenced to concurrent terms of 82 months of imprisonment on Counts 1, 26, 28, and 41 and to concurrent terms of 60 months of imprisonment on Counts 37 and 42-44. The district court ordered Jackson to pay $800 in costs and $100,000 in restitution.

In these consolidated appeals, Gray and Jackson now timely appeal their convictions. Gray also appeals his sentences.

II.

A.

The prosecution's case against defendants consisted of, in significant part, wiretap evidence obtained pursuant to Title III, which sets forth specific procedural requirements that must be followed before the government will be allowed to intercept the private conversations of citizens. As a prerequisite to surveillance, the government must submit a properly authorized application and obtain an approval order from a judge of competent jurisdiction. 18 U.S.C. § 2516. The Act not only delineates the substantive provisions that must be included in both the surveillance application and authorizing order, but also proscribes the offenses covered under the Act, requires specific findings of fact on the part of the issuing judge with regard to probable cause, and places

temporal limitations on the validity of the order. 18 U.S.C. § 2518. "The Supreme Court has explained that this system evinces Congress's 'clear intent to make doubly sure that the statutory authority be used with restraint and only where circumstances warrant the surreptitious interception of wire and oral communications.'" *United States v. Staffeldt*, 451 F.3d 578, 580 (9th Cir. 2006) (quoting *United States v. Giordano*, 416 U.S. 505, 515 (1974)).

Title III provides for the suppression of all or part of the contents of intercepted wire or oral communications "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. "Any aggrieved person in any trial, hearing, or proceeding in or before any court" may move to suppress intercepted communications on three grounds: "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was interpreted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." 18 U.S.C. § 2518(10)(a)(i-iii).

"The words 'unlawfully intercepted' [contained in paragraph (i)] are themselves not limited to constitutional violations," but may include statutory infringements. *Giordano*, 416 U.S. at 527. However, the Supreme Court "did not go so far as to suggest that every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.'" *United States v. Chavez*, 416 U.S. 562, 574-75 (1974). "To the contrary, suppression is required [under paragraph (i)] only for a 'failure to satisfy any of those statutory requirements that directly and substantially

implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *United States v. Donovan*, 429 U.S. 413, 433-34 (1977) (quoting *Giordano*, 416 U.S. at 527).

While paragraphs (ii) and (iii) of § 2518(10)(a) "must be deemed to provide suppression for failure to observe some of the statutory requirements that would not render interceptions unlawful under paragraph (i)," *Giordano*, 416 U.S. at 527, "every circuit to consider the question has held that § 2518(10)(a)(ii) does not require suppression if the facial insufficiency of the wiretap order is no more than a technical defect." *United States v. Moore*, 41 F.3d 370, 374-75 (8th Cir. 1994) (citing cases from the Second, Third, Fifth, Sixth, and Ninth Circuit Courts of Appeals). Indeed, as represented accurately by the *Moore* court, we have held that suppression is not required for "'every minor facial insufficiency.'" *United States v. Vigi*, 515 F.2d 290, 293 (6th Cir. 1975) (quoting *United States v. Acon*, 513 F.2d 513, 517 (3d Cir. 1975)).

Before trial, Gray, joined by Jackson, filed motions to suppress the Title III intercepts and video surveillance that were used in the investigation on the ground that the government failed to comply with the statutory prerequisites of the surveillance application process. In its subsequent decision denying defendants' motions to suppress, *see United States v. Gray*, 372 F. Supp. 2d 1025 (N.D. Ohio 2005), the district court explained the factual background giving rise to defendants' claims:

The wiretaps originated with a January 15, 2002, application submitted by David A. Sierleja, an attorney of the DOJ. Sierleja made the application as an investigative or law enforcement officer under Title III. [18 U.S.C. § 2510(7)]. The January 2002 application has several defects. First, Sierleja had received approval for the application from Deputy Assistant Attorney General Malcolm, who is a specially designated official authorized to review and approve Title III wiretaps. However, the January 15, 2002, application does not identify the specially-designated Justice Department official who approved the application. The Title III application also does not include a copy of the letter from the specially-designated DOJ official that approved the intercept. In addition, the January 15, 2002, application was not sworn under oath or affirmation, and it does not indicate the time when [Assistant United States Attorney] Sierleja executed it. Sierleja filed the application on January 16, 200[2].

On January 16, 2002, Judge Oliver reviewed the application and issued an order granting an application to commence a thirty-day Title III wiretap of Gray's various phone business and cellular phone numbers. Like the application, the order does not identify the Justice Department official who approved the application.

Following the expiration of the thirty-day period, the Government sought to renew the wiretap. In applying to renew the wiretaps,

however, the Government failed to comply with the statutory requirement that [a] specially-designated DOJ official approve the renewal application. A district court judge granted the application. After later appreciating that the Government had not obtained necessary approval from any authorized Justice Department official, the Government self-suppressed the tainted interceptions from the unauthorized renewal applications, spanning from February 15, 2002 to May 13, 2002. Gov't Br., Dkt. 239, at 31.

Seeking to correct the problem associated with the interceptions from February 15, 2002 through May 13, 2002, the Government filed a new Title III wiretap application on July 30, 200[2], regarding the same phone numbers. Correcting the problems in the earlier applications, the July 30, 2002, application identifies the authorizing official and attaches two exhibits: the DOJ letter specially designating the authorizing official and the authorizing official's letter approving the July 30, 2002 intercept. In attempting to show probable cause for this July 30, 2002, application, the Government repeated many of the probable cause allegations that were contained in its January 16, 2002 application. However, the Government also added evidence intercepted in the January 16, 2002 through February 14, 2002 period of wiretaps and evidence derived independently. Judge Matia

> approved the application on July 30, 2002, and the clerk's office filed the documents under seal.

Id. at 1029-30 (footnotes omitted).

In April 2005, after defendants moved to suppress the wiretaps, the district court held a suppression hearing, at which the parties examined the January and July 2002 applications and orders for the intercepts. *Id.* at 1030. After the hearing, the government proffered that, if required, Judge Oliver would testify that he was aware that Sierleja had obtained DOJ approval for the January 15, 2002, application before he signed the order. *Id.* at 1031. The district court denied the government's motion to accept the proffer, but reopened the hearing in May 2005 to allow Sierleja to testify regarding the circumstances surrounding the submission of his application for Title III surveillance. *Id.* Sierleja testified that when he applied for the initial wiretap in January 2002, he told Judge Oliver that he had obtained authorization from a DOJ official specially designated to approve wiretap applications before submitting the application. Sierleja had the authorization letter with him when he appeared before Judge Oliver but did not show the letter to the court. *Id.* According to the district court, "[i]t is not clear from the record whether Sierleja informed Judge Oliver of the name of the authorizing official or whether he merely informed Judge Oliver that he had obtained approval." *Id.*

On June 6, 2005, following the reconvened hearing, the district court issued its opinion and order denying defendants' motions to suppress the Title III wiretap evidence. In a separate order issued on June 8, 2005, the district court denied Gray's motion to suppress

interceptions from a closed circuit television camera placed in his office. Defendants now contest the denial of their motions to suppress on the same grounds presented to the district court.

When reviewing a district court's ruling on a motion to suppress a wiretap, we will reverse the court's findings of fact only if they are clearly erroneous. *United States v. Rice*, 478 F.3d 704, 709 (6th Cir. 2007). We review de novo questions of law, including legal conclusions as to the existence of probable cause. *Id.* In reviewing the validity of a Title III surveillance order, "we will accord great deference to the determinations of the issuing judge. However, this deference does not logically apply where the issuing judge is given misleading information in the wiretap application or supporting affidavits." *Id.* (internal citation and quotation marks omitted).

Defendants cite numerous alleged defects on the faces of the January 2002 and July 2002 applications and orders, and in the process used to obtain them, that require suppression of some or all of the derivative evidence secured by the wiretaps. The question before us is whether the district court erred in concluding that these purported imperfections did not constitute grounds for suppression under 18 U.S.C. § 2518(a)(10).

B.

First, defendants allege that the January 2002 and July 2002 wiretap applications violate 18 U.S.C. § 2516, which requires the approval of a wiretap application by the Attorney General or a high-ranking DOJ official "specially designated by the Attorney

General," 18 U.S.C. § 2516(1). Although the authorization letters for the January 2002 and July 2002 applications in this case were signed by Deputy Assistant Attorney General John Malcolm, the text of the letters includes the typed name of "Michael Chertoff, Assistant Attorney General, Criminal Division, Department of Justice," indicating that Chertoff drafted the letters. Defendants thus contend that the applications are ambiguous – it is unclear which official, if any, actually authorized the application – and, if it was Malcolm, argue that he was not "specially designated" under § 2516(1) to approve the application.

Defendants also cite the government's admitted noncompliance with a related requirement – that each application and order shall include the identity of the DOJ official authorizing the application – as additional grounds for suppression. 18 U.S.C. § 2518(1)(a) and (4)(d). It is undisputed in this case that the January 2002 application and order violate § 2518(1)(a) and (4)(d) through the omission of the name of the authorizing official on the face of the documents. *Gray*, 372 F. Supp. 2d at 1034. The district court nonetheless concluded that any defects in the January and July 2002 applications and orders did not warrant suppression under the circumstances. We agree.

In *Giordano*, the Supreme Court held that § 2516(1) of Title III "plainly calls for the prior, informed judgment of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop. The mature judgment of a particular, responsible Department of Justice official is interposed as a critical

precondition to any judicial order." *Giordano*, 416 U.S. at 515-16. The Court concluded that the Executive Assistant to the Attorney General was not such a "specially designated" official empowered by § 2516(1) to authorize applications for wiretap orders.[2] Consequently, a Title III wiretap application authorized by the Executive Assistant was "unlawful" under paragraph (i) of § 2518(10)(a), and required suppression of evidence derived from the ensuing court order. *Id.* at 523. The Court reasoned that because "the provision for pre-application approval was intended to play a central role in the statutory scheme . . . suppression must follow when it is shown that this statutory requirement has been ignored." *Id.* at 528.

The *Giordano* Court concluded, however, that suppression was not warranted under paragraph (ii) of § 2518(10)(a) because "the order, on its face, clearly, though erroneously, identified [an] Assistant Attorney General . . . as the Justice Department officer authorizing the application, pursuant to special designation by the Attorney General." *Id.* at 526 n.14.

In *Chavez*, a companion case to *Giordano,* the Court held that where the evidence showed that the Attorney General had actually authorized the contested wiretap application, the fact that the application and court order misidentified an Assistant Attorney General as the authorizing official did not render the resultant interceptions "unlawful" under paragraph (i), or the application "insufficient on its

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[2] 18 U.S.C. § 2516(1) was amended after *Giordano* to expand the DOJ positions that qualified as authorizing officials for purposes of Title III.

face" under paragraph (ii) of § 2518(10)(a), so as to require suppression for failure to comply with § 2516(1):

> Here, the interception order clearly identified "on its face" Assistant Attorney General Wilson as the person who authorized the application to be made. Under § 2516(1), he properly could give such approval had he been specially designated to do so by the Attorney General, as the order recited. That this has subsequently been shown to be incorrect does not detract from the facial insufficiency of the order. Moreover, . . . it appears that the Attorney General authorized the application, as he also had the power to do under § 2516(1). In no realistic sense, therefore, can it be said that the order failed to identify an authorizing official who possessed statutory power to approve the making of the application.

Chavez, 416 U.S. at 573-74 (footnote omitted).

The *Chavez* Court also addressed the issue of misidentification of the authorizing official in the context of § 2518(1)(a) and (4)(d):

> The application and order for the Chavez wiretap did not correctly identify the individual authorizing the application, as 18 U.S.C. § 2518(1)(a) and (4)(d) require. Of this there is no doubt. But it does not follow that because of this deficiency in reporting, evidence obtained pursuant to the order may not be used at a trial of respondents. There is no claim of any constitutional infirmity arising from this defect,

> nor would there be any merit to such a claim, and we must look to the statutory scheme to determine if Congress has provided that suppression is required for this particular procedural error.

Id. at 570.

The Court reviewed the legislative history of these provisions and found that the requirements serve primarily to "'fix responsibility' for the source of the preliminary approval." *Id.* at 575. Thus,

> [w]hile adherence to the identification reporting requirements of § 2518(1)(a) and (4)(d) . . . can simplify the assurance that those whom Title III makes responsible for determining when and how wiretapping and electronic surveillance should be conducted have fulfilled their roles in each case, *it does not establish a substantive role to be played in the regulatory system.*
>
> *Nor is there any legislative history concerning these sections*, as there is, for example, concerning § 2516(1), . . . *to suggest that they were meant, by themselves, to occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance.*

Chavez, 416 U.S. at 577-78 (emphasis added).

The *Chavez* Court therefore concluded that because the misidentification of the authorizing official "did not affect the fulfillment of any of the reviewing or approval functions required by Congress," *id.* at 575,

suppression was not necessary under the circumstances:

> When it is clearly established, therefore, that authorization of submission of a wiretap or electronic surveillance application has been given by the Attorney General himself, but the application, and, as a result, the interception order incorrectly state that approval has instead been given by a specially designated Assistant Attorney General, the misidentification, by itself, will not render interceptions conducted under the order "unlawful" within the meaning of § 2518(10)(a)(i) or the disclosure of the contents of intercepted communications, or derivative evidence, otherwise "in violation of" Title III within the meaning of § 2515.

Id. at 579.

Although the *Chavez* Court hinted in dicta that it was unpersuaded by the contention that "an order incorrectly identifying who authorized the application is equivalent to an order failing to identify anyone at all as the authorizing official" when measured for facial insufficiency under § 2518(10)(a)(ii), *id.* at 573, the Court never reached the present issue of complete omission of an authorizing official's identity from a Title III application or order.

Nonetheless, we agree with the district court that the present case "resembles misidentification cases where courts refused to suppress the intercepted conversations when an authorizing official in fact approved the application because the courts emphasized that the court had notice that the Justice

Department authorized the application." *Gray*, 372 F. Supp. 2d at 1037 (citing *United States v. O'Connell*, 841 F.2d 1408, 1416 (8th Cir. 1988) (misidentification in application not grounds for suppression where court approving order knew of it and authorization letter was attached to application)).

In the wake of *Giordano* and *Chavez*, we, along with other courts, have held that suppression is not warranted under §§ 2516(1) or 2518(1)(a)and (4)(d) when a wiretap application or order either misidentifies a DOJ official who could not legally authorize the wiretap or, as in the present case, identifies no official at all, so long as the record shows that a statutorily designated official actually gave the authorization. *See United States v. Callum*, 410 F.3d 571, 576 (9th Cir. 2005) (failure to identify any approving DOJ official in wiretap order deemed "minor insufficiency for which suppression is not the appropriate remedy," where issuing judge was presented with written DOJ authorization for wiretap before signing order); *United States v. Radcliff*, 331 F.3d 1153, 1160-63 (10th Cir. 2003), and *United States v. Fudge*, 325 F.3d 910, 918 (7th Cir. 2003) (where applications were in fact approved by specially designated DOJ officials, failure in wiretap orders to name individuals who authorized application was merely a "technical defect" that did not require suppression); *United States v. Lawson*, 545 F.2d 557, 562-63 (7th Cir. 1975), and *United States v. Swann*, 526 F.2d 147, 149 (9th Cir. 1975) (facial insufficiency of applications indicating approval by official not statutorily designated to approve wiretap applications did not require suppression where Attorney General in fact approved applications); and *Vigi*, 515 F.2d at 292-93 (suppression not required where wiretap

application identified acting assistant attorney general as authorizing official, but Attorney General actually approved it).

In the present case, the district court found that: (1) Deputy Assistant Attorney General Malcolm was "specially designated" to authorize the Title III applications, pursuant to a March 8, 2001, order from then Attorney General John Ashcroft designating any Deputy Assistant Attorney General of the criminal division as having authority to approve wiretap applications; (2) Malcolm thus had authority to, and did in fact, authorize the January 2002 and July 2002 applications; (3) given his authority, Malcolm was thus "'presumed to have properly exercised that power and the condition[s] precedent [are] presumed to have been met unless the defendants offer evidence, apart from mere conjecture or speculation, to rebut this presumption'"; and (4) that defendants failed to introduce sufficient evidence to legitimately dispute the authenticity of Malcolm's authorizations. *Gray*, 372 F. Supp. 2d at 1032-34 (quoting *O'Connell*, 841 F.2d at 1416). The district court therefore held that suppression of the January 2002 and July 2002 applications was not required under § 2516(1).

We find no clear error in the factual determinations of the district court. The evidence of record confirms that Malcolm had the authority as a "specially designated" official to approve the applications and did in fact do so. Under these circumstances, the underlying purpose of § 2516(1) – "to insure that decisions to wiretap were made by the named officials and did not reach into the lower echelons of command" – was served. *United States v. Lambert*, 771 F.2d 83, 90-91 (6th Cir. 1985) (emphasis omitted) (quoting

United States v. Cox, 462 F.2d 1293, 1300 (8th Cir. 1972)). We therefore conclude that suppression of the evidence obtained from the January 2002 and July 2002 applications and court orders was not required under § 2518(10)(a)(i) or (ii) for failure to obtain approval from a "specially designated" official.

Moreover, as the district court explained so succinctly, "[b]ecause the procedures employed in this case sufficiently fixed responsibility with the Justice Department, which satisfies the underlying purpose of the identification requirement [of § 2518(1)(a) and (4)(d)], suppression is not warranted for omitting Malcolm's name from the [January 2002] application [and order]." *Gray*, 372 F. Supp. 2d at 1037. The essential safeguards of Title III were not undermined.[3] Judge Oliver had notice that a qualified "specially designated" official had approved the application before his perusal and approval of the order. The district court was justifiably hard-pressed to find any "resultant prejudice" to defendants. *Id.* at 1038. In light of defendants' opportunity to examine the

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[3] In contrast, in *Staffeldt*, cited favorably by defendants, a wiretap application was deemed facially insufficient where the application did not identify any authorizing official and instead mistakenly attached official approval for a wiretap application in an entirely unrelated case from a different district. 451 F.3d at 579. The Ninth Circuit Court of Appeals held that suppression was called for because "the absence of an authorization memorandum regarding Staffeldt" was "likely to affect the judge's determination that a wiretap is or is not warranted." *Id.* at 584 (internal citation and quotation marks omitted). *Staffeldt* is readily distinguishable from the case at hand. Here, where Judge Oliver had notice of approval by a specially designated official, the omission of that information from the application and order could not have affected the decision to grant the wiretap.

application and order at the suppression hearing, and the fact that the application actually had been authorized by Malcolm despite the identification omission, there was no prejudice to defendants arising from this breach of a requirement that does not "occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance." *Chavez*, 416 U.S. at 578. The violation, technical rather than substantive in nature, did not require suppression of the January 2002 application under § 2518(10)(a).

C.

Defendants allege failure by the government to make the application "upon oath or affirmation" as required by § 2518(1). Although the final page of the application containing Sierleja's signature was not signed by Judge Oliver, the application stated that Sierleja had been "duly sworn" and the order signed by Judge Oliver approving the application stated that Sierleja made the application "under oath." Under these circumstances, the district court properly found that § 2518(1) had been satisfied. *Gray*, 372 F. Supp. 2d at 1034; *see also United States v. Florea*, 541 F.2d 568, 576 (6th Cir. 1976) (failure of FBI agent to sign affidavit in support of Title III application did not warrant suppression under § 2518(1) where judge based order on agent's oral sworn statements made in his presence, as well as the written application).

D.

In their appeals, defendants raise several other grounds for reversal of the district court's orders denying their motions to suppress evidence obtained

through electronic surveillance and closed-circuit television recordings. They allege that: (1) there was insufficient probable cause to support issuance of the wiretap orders under 18 U.S.C. § 2518(3); (2) the "necessity requirement" of 18 U.S.C. § 2518(1)(c) was not satisfied with regard to the January 2002 and July 2002 applications;[4] (3) the government failed to minimize the interception of non-relevant conversations as required by 18 U.S.C. § 2518(5); (4) the government failed to terminate its surveillance upon attainment of the authorized objective, or in any event in thirty days, 18 U.S.C. § 2518(5); (5) the government failed to timely notify defendants that surveillance had ceased under 18 U.S.C. § 2518(8)(d); and (6) the district court erroneously denied Gray's motion to suppress closed-circuit television recordings. Based upon our review of the record, however, we conclude that these issues lack merit and do not warrant further review. The district court was thorough in its analysis and correct in its conclusions that none of these stated grounds mandate suppression of the surveillance evidence obtained under Title III or the video recordings. We therefore affirm the district court's orders denying defendants' motions to suppress.

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[4] "Title III requires that an application for a wiretap order contain a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." *Rice*, 478 F.3d at 709-10 (internal citation and quotations marks omitted).

III.

Defendants contend that the district court erred in refusing to require the government to disclose the conversations that were illegally intercepted between February 15, 2002, and May 13, 2002, and subsequently sealed by the government.[5] The court denied defendants' multiple motions to inspect the communications made during and after trial. We review the district court's decision on this discovery matter for an abuse of discretion. *United States v. $174,206.00 in U.S. Currency*, 320 F.3d 658, 663 (6th Cir. 2003).

Section 2511(1) of Title III makes it unlawful to "intentionally disclose[] . . . to any other person" or to "intentionally use[] . . . the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of [the statutory provisions]," 18 U.S.C. § 2511(1)(c), (d). Section 2515 expressly prohibits the use of such unlawful communications in a court proceeding:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in any trial, hearing, or other proceeding in or before any court . . . if

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[5] The parties do not dispute that these communications were unlawfully obtained by the government.

> the disclosure of that information would be in violation of this chapter.

18 U.S.C. § 2515.

Gray contends that he was entitled to disclosure of the sealed communications under several judicially recognized exceptions to the disclosure prohibitions of §§ 2511(1) and 2515. We conclude, however, that none of these exceptions applies to the sweeping disclosure sought by defendants.

"The protection of privacy – one of the purposes of Title III . . . – requires strict controls on the repetition of the contents of illegally intercepted communications." *Nix v. O'Malley*, 160 F.3d 343, 350-51 (6th Cir. 1998). "'Each time the illicitly obtained recording is replayed to a new and different listener, the scope of the invasion widens and the aggrieved party's injury is aggravated.'" *Id.* at 351 (quoting *Fultz v. Gilliam*, 942 F.2d 396, 402 (6th Cir. 1991)). Consequently, we have been loath to allow the republication of illegally obtained wiretap evidence and have limited disclosure to "very narrow[]" circumstances. *Id.* at 350.

First, Gray maintains that he was entitled to use the suppressed wiretaps for impeachment purposes. However, "[w]hether or not an impeachment exception exists at all is an open question in this Circuit." *United States v. Wuliger*, 981 F.2d 1497, 1506 (6th Cir. 1992). We have noted that the handful of other courts that have recognized such an exception in criminal cases have limited it to use by the government. *Id.* at 1505-06 (citing *United States v. Echavarria-Olarte*, 904 F.2d

1391 (9th Cir. 1990); *United States v. Vest*, 813 F.2d 477 (1st Cir. 1987); *Anthony v. United States*, 667 F.2d 870 (10th Cir. 1981); and *United States v. Caron*, 474 F.2d 506 (5th Cir. 1973));[6] *see also Nix*, 160 F.3d at 350 (citing *Wuliger*, 981 F.2d at 1506). Under the present circumstances, there is no convincing reason to create, let alone expand to defendant, an impeachment exception where the illegally obtained conversations were self-suppressed by the government and not available for use by either party at trial. Moreover, the record reflects that even without access to the suppressed tapes, Gray's attorney conducted extensive cross-examination of the government's witnesses and was able to point out contradictions in the witnesses' testimony to the jury. Accordingly, Gray's attempt to compel disclosure of the illegal intercepts for this purpose must fail.

The "clean hands" exception to the proscriptions of Title III likewise does not require disclosure under the present circumstances. Consistent with the limitation on disclosure of Title III intercepts for impeachment purposes, the "clean hands" exception permits only the government, not a defendant, to use the contents of illegal wiretaps if it played no role in the interception. *Nix*, 160 F.3d at 350-51 (citing *United States v.*

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[6] In *Wuliger*, the defendant, an attorney, was convicted of repeated disclosure of nonconsensual recordings in violation of Title III during the course of his representation of a client in state divorce proceedings. We held that "assuming that an exception exists in the criminal law based on Congress' express approval in the legislative history to the continued use of illegally obtained wiretap evidence for impeachment purposes by the government in criminal cases, we see no basis to create such an exception in civil actions between private parties." *Wuliger*, 981 F.2d at 1506.

Murdock, 63 F.3d at 1391, 1403 (6th Cir. 1995)). The so called "defense," "adjudication," and "consent to use" exceptions similarly do not justify disclosure here, for the reasons stated by the district court in its May 9, 2005, opinion denying defendants' motion to inspect the suppressed applications, orders, and intercepts.

Gray also argues that disclosure is mandated under the Jencks Act, 18 U.S.C. § 3500(a), (b), which provides in pertinent part:

> (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.
>
> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

18 U.S.C. § 3500(a), (b).

We have not recognized an exception to Title III's disclosure prohibitions for statements made under the Jencks Act. Indeed, as the district court observed, the issue of whether the Jencks Act requirements "trump[]" the Title III prohibitions of 18 U.S.C. §§ 2511 and 2515 is an issue of first impression in this court. We agree with the district court's assessment, however, that because Gray could not have used the illegally intercepted statements to impeach government witnesses, *Nix*, 160 F.3d at 350, disclosure of the unlawful wiretaps would not serve the distinct purpose of the Jencks Act, which

> was designed to prevent defendants from engaging in "blind fishing expeditions" through the government's files, *see, e.g., United States v. Pope*, 574 F.2d 320, 324 (6th Cir. 1978), but at the same time, to assure defendants of their Sixth Amendment right to confront their accusers by compelling the government to produce statements useful for impeachment of government witnesses. *United States v. Carter*, 613 F.2d 256 (10th Cir. 1979). The Act accommodates both of these concerns by protecting the government's interests before trial and by protecting the defendant's rights at trial, since under the Act the impeachment material is disclosed in time to be used by the defense at trial.

United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988).

Furthermore, the government did not review the unlawful wiretaps, but self-suppressed them when the illegalities came to light. Thus, defendants are not

presented with the paramount concern voiced in *Presser* – that the denial of access to facts known to the prosecution but not to a defendant would hinder the defendant's meaningful cross-examination because witnesses were not made equally available to both parties. We therefore conclude that the Jencks Act does not, under the circumstances, open a door to inspection of these illegally intercepted communications.

Likewise, Federal Rule of Criminal Procedure 16(a)(1)(B)(i) does not require that the government make the sealed wiretaps available to defendants. This rule requires disclosure of "any relevant written or recorded statement by the defendant if: . . . the statement is within the government's possession, custody, or control; and the attorney for the government knows – or through due diligence could know – that the statement exists," FED. R. CRIM. P. 16(a)(1)(B)(I).

Citing *Lanier v. Bryant*, 332 F.3d 999, 1005 (6th Cir. 2003), Gray contends that Title III does not preclude disclosure of the illegal intercepts under Rule 16. In *Lanier*, a federal prisoner brought a civil action against several government prosecutors and law enforcement agents, pursuant to 42 U.S.C. § 1983 and other statutes, alleging that the defendants violated § 2511(1)(c) of Title III by disclosing illegally intercepted telephone conversations in response to his Rule 16 pre-trial discovery request. *Lanier*, 332 F.3d at 1003-04. We affirmed the district court's order granting summary judgment in favor of the defendants, holding that "[s]ince the recordings were of Lanier, and Lanier presumably requested their disclosure during discovery in his criminal prosecution,

. . . any disclosure made pursuant to Rule 16 could not constitute an illegal disclosure." *Id.* at 1005.

Lanier is not persuasive authority for several reasons. First, unlike the present case, it did not involve a criminal prosecution, but a civil action. Second, there are dispositive factual differences between *Lanier* and the case at hand. In the context of Lanier's prosecution, there was neither a finding by this court nor a concession by the government that the conversations were illegally intercepted. *See United States v. Lanier*, 33 F.3d 639, 661 (6th Cir. 1994), *vacated on other grounds*, 43 F.3d 1033 (6th Cir. 1995) ("Although the government claimed that it acted lawfully in intercepting the cordless telephone calls, it nevertheless agreed not to use the tape recordings of the cordless telephone conversations at trial."). Significantly, in *United States v. Lanier*, the government had access to and knowledge of the contents of the intercepted phone conversations and used the intercepts during the course of its criminal prosecution of Lanier. Conversely, the government in the present case self-suppressed the admittedly illegal intercepts without reviewing the contents.

Thus, even assuming arguendo that *Lanier v. Bryant* creates an exception to Title III's disclosure prohibition in the context of Rule 16, the government in the instant case provided defendant in discovery with all of the wiretap tapes to which it had access and could not have used the illegally intercepted statements – of which it was unaware – during the investigation or at trial. Under these circumstances,

Title III does not require the disclosure requested by Gray.[7]

Finally, defendants argue that without access to the tainted surveillance, there is no way to determine whether any of the information gleaned from it was used to secure the additional untainted wiretaps. Defendants suggest that the government's case may have been tainted by the unlawful interceptions and claim that FBI Agent Peter Smith, a government witness, may have reviewed the suppressed tapes. However, during questioning outside of the presence of the jury, Smith testified that he was assigned to this case to replace agents who might have been exposed to the illegally obtained wiretaps and that he was never privy to the contents of the suppressed tapes. Thus, the district court properly concluded that there was no

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[7] In *Murdock*, we explained that:

> Our independent reading of the legislative history of Title III leads us to the conclusion that while privacy was a major goal of the legislation, it was privacy in a particular context, namely, that an individual who is the *victim* of an unlawful interception is entitled to protection in court proceedings from any attempt by the *perpetrator* to use the interception against the victim or in any way to benefit from the information which was either contained in, or was the fruit of, the unlawful interception.

Murdock, 63 F.3d at 1403. Gray is undoubtedly the victim of the government's unlawful interceptions, but because there was no attempt by the government to use the interceptions against Gray, the specific privacy concerns underlying Title III are not implicated in this case and thus do not compel disclosure of the illegally obtained intercepts.

evidence of a taint that would justify disclosure of the suppressed wiretaps.[8]

None of the remaining arguments raised by defendants in favor of disclosure of the illegally obtained intercepts convince us that the district court abused its discretion in denying access of the materials to defendants.

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[8] Defendants' citation to *Alderman v. United States*, 394 U.S. 165 (1969), does not sway our conclusion in this regard. In *Alderman*, after the defendants' convictions had been affirmed and their cases were pending before the Supreme Court, it came to light that the government had engaged in electronic surveillance that may have violated their Fourth Amendment rights and tainted their convictions. *Id.* at 167. The Court remanded the case to give the defendants an opportunity to review the transcripts of the illegally intercepted conversations to determine if any of the evidence "might have contributed to the Government's case." *Id.* at 182.

Unlike the present circumstances, *Alderman* involved not only an acknowledged violation of constitutional rights, but also a concession by the government that the illegally acquired evidence was "arguably relevant to the evidence offered against the defendant[s]." *Id.* at 184. The facts in *Alderman* stand in stark contrast to the handling of the Title III violations here, where there was no constitutional violation, the government discovered the Title III illegalities three years before trial, self-suppressed the tainted intercepts, and took steps to ensure that no prosecutors or FBI agents assigned to the case had any knowledge of the substance of the illegally obtained evidence.

IV.

Next, Gray and Jackson challenge their convictions under the Hobbs Act on grounds of insufficient evidence.

We review de novo the district court's denial of a motion for judgment of acquittal. *United States v. McAuliffe*, 490 F.3d 526, 537 (6th Cir. 2007). The pertinent inquiry is whether, after viewing the evidence in the light most favorable to the prosecution and giving it the benefit of all reasonable inferences from the testimony, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.*

A.

Gray and Jackson question the viability of their Hobbs Act convictions in light of our recent decision in *United States v. Brock*, 501 F.3d 762 (6th Cir. 2007), which was issued after oral argument in our court on these consolidated appeals. Defendants requested, and we permitted, supplemental briefing on the impact of *Brock* on their Hobbs Act convictions.

The Hobbs Act, 18 U.S.C. § 1951, makes it unlawful to "obstruct[], delay[], or affect[] commerce . . . by robbery or extortion or attempt[] or conspire[] to do so . . . ." 18 U.S.C. § 1951(a). Section 1951(b)(2) defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2). "Rather than requiring an explicit quid-pro-quo promise, the elements of extortion are 'satisfied by something short

of a formalized and thoroughly articulated contractual arrangement (i.e., merely knowing that the payment was made in return for official acts is enough).'" *United States v. Hamilton*, 263 F.3d 645, 653 (6th Cir. 2001) (quoting *United States v. Blandford*, 33 F.3d 685, 696 (6th Cir. 1994)).

Generally, to convict a defendant of aiding and abetting extortion, the government must prove that the defendant (1) aided the inducement of a victim to part with property; (2) that he did so knowingly and willingly with extortionate means; and (3) that interstate commerce was affected. *United States v. Cornier-Ortiz*, 361 F.3d 29, 37 (1st Cir. 2004).

Under the "color of official right" theory that is alleged in the instant case, "a public official . . . obtains a 'payment to which he was not entitled, knowing that the payment was made in return for official acts.'" *United States v. Kelley*, 461 F.3d 817, 826 (6th Cir. 2006) (quoting *Evans v. United States*, 504 U.S. 255, 268 (1992)). It is not essential that a public official have final decision making authority: "[t]he Hobbs Act reaches anyone who actually exercises official powers." *United States v. Collins*, 78 F.3d 1021, 1032 (6th Cir. 1996) (internal citation and quotation marks omitted).

"It is well settled in this Circuit that 'a private citizen who is not in the process of becoming a public official may be convicted of Hobbs Act extortion under the "color of official right" theory only if that private citizen either conspires with, or aids and abets, a public official in the act of extortion.'" *Kelley*, 461 F.3d at 827 (quoting *United States v. Saadey*, 393 F.3d 669, 675 (6th Cir. 2005)); *see also Collins*, 78 F.3d at 1031 (private individuals may be convicted of extortion

under color of official right "where the individual aided and abetted a public official's receipt of money to which he was not entitled."). The underlying rationale is that "[o]ne who collects the extorted payments is no less guilty than the official he serves." *Collins*, 78 F.3d at 1031 (internal citation and quotation marks omitted).

In *Brock*, we examined closely the portion of the Hobbs Act that defines "extortion" as "the obtaining of *property from another, with his consent*," 18 U.S.C. § 1951(b)(2) (emphasis added). Against the backdrop of charges of conspiracy to commit extortion under color of official right, we concluded that this statutory language is far more than mere surplusage.

The two defendants in *Brock* were bail bond company owners who bribed a court clerk to prevent the collection of bonds when their criminal-defendant clients absconded. They were convicted of conspiring with the clerk to extort property "under color of official right," in violation of the Hobbs Act, 18 U.S.C. § 1951(a). *Brock*, 501 F.3d at 766. The defendants contended on appeal that the Hobbs Act did not permit them to be convicted of conspiring to extort their own property, and we agreed, reversing their convictions. We opined that

> [t]o be covered by the statute, the alleged conspirators . . . must have formed an agreement to obtain "property from *another*," which is to say, formed an agreement to obtain property from someone outside the conspiracy. Yet that did not happen. These three people did not agree, and could not have agreed, to obtain property from "another" when no other person

> was involved – when the property, so far as the record shows, went from one coconspirator (one of the Brocks) to another [the court clerk]. We see no reason to ignore the "property from another" requirement and ample reason to give it content . . . .
>
> In addition to requiring the conspirators to agree to obtain property from another, the statute requires the conspirators to obtain that property with the other's *consent*. How do (or why would) people conspire to obtain their own consent?

Id. at 767 (citation omitted).

We further explained, in broader terms, that

> [t]he Hobbs Act is meant to prohibit public officials from obtaining property from others by extortion. Yet sweeping the Brocks within its coverage through a conspiracy theory effectively transforms the Act into a prohibition on paying bribes to public officials. While the definition of extortion "under color of official right" correctly extends to public officials who *accept* a bribe when there is a quid pro quo for the payment, *see Evans* [*v. United States*], 504 U.S. [255], 269 [(1992)]; *United States v. Harding*, 563 F.2d 299, 305 (6th Cir. 1977), neither the Supreme Court nor our court has construed the statute to cover private individuals who *offer* a bribe to public officials. Congress knows how to prohibit the giving or offering of bribes directly [citing, *e.g.*, 18 U.S.C. §§ 201, 210, 212, and 226]. Having opted not to punish the giving of bribes

> directly, Congress should not be treated as having prohibited them through the sleight of indictment of an extortion conspiracy.

Id. at 768.

We thus concluded that when the government chooses to indict what it believes is bribery of state officials under a Hobbs Act conspiracy, "[e]ither the Act picks up all perpetrators, acquiescors and victims, or it picks up none of them. We say it picks up none of them and would leave it to Congress (if it wishes) to do what it has done before: Make it a crime to offer or give a bribe to a public official." *Id.* at 771.

Nonetheless, we reaffirmed the principle established in *Kelley* and *Collins*, that "[t]he government remains free to charge private individuals with violating the Hobbs Act when they conspire with public officials or aid and abet them in an extortion scheme; it just must satisfy the 'property from another' and 'with his consent' requirements in doing so." *Id.* at 768-69.[9]

Gray and Jackson argue that here, as in *Brock*, the conduct underlying their convictions is not within the scope of the Hobbs Act. According to defendants, the evidence, at best, alleges a scheme to bribe state

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[9] In *Brock*, we noted: "All agree that the Brocks did not commit a substantive act of extortion. They did not 'obtain[] . . . property from another' person. [18 U.S.C.] § 1951(b)(2). And they are not public officials and thus could not have obtained property 'under color of official right,' *id.*, and did not otherwise use 'actual or threatened force, violence, or fear' in the course of this bribery scheme," *Brock*, 501 F.3d at 767.

officials, but does not demonstrate that defendants conspired with, or aided and abetted, public officials in obtaining "property *from another*," a third party. Gray and Jackson assert that no third party was ever coerced or asked to make a payment in return for an official act; instead, taking the evidence in the light most favorable to the government, payments were made directly by defendants to public officials to gain favor and to improve their lot as consultants.

It is therefore incumbent upon us to evaluate the proofs pertaining to the discrete transactions in three different cities that are the bases of the Hobbs Act convictions against defendants.[10] We conclude that Gray's convictions on Counts 30, 31, and 41, and Jackson's conviction on Count 41, must be reversed.

B.

1. East Cleveland, Ohio

Gray was convicted on Counts 2 through 9 of the superseding indictment, which alleged Hobbs Act violations as they related to Gray's transactions with Emmanuel Onunwor, the mayor of East Cleveland from 1998 to 2004 and a former city councilman.[11] Count 2 averred a Hobbs Act conspiracy by Gray, Onunwor, and others, including "public officials in East Cleveland, Gray's clients, and Gray's consulting

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[10] Gray was acquitted of, and Jackson was not charged with, Hobbs Act violations emanating from interaction with public officials in the fourth city, Cleveland, Ohio.

[11] Jackson was not alleged to have been involved in the East Cleveland conspiracy.

associates," stemming from an alleged agreement by Gray and the others to provide things of value to public officials, including Onunwor, in return for official acts involving the governance of the City of East Cleveland. The related substantive Hobbs Act counts (Counts 3-9) each alleged that on a specific date, Gray and others, "aiding and abetting each other, attempted to and did obstruct, delay, and affect commerce . . . through extortion, by Emmanuel Onunwor obtaining, under color of official right, cash in an envelope from Nate Gray with his consent."

The evidence indicates that when Onunwor began experiencing financial difficulties in 1994, Gray provided him with cash on several occasions, and, after Onunwor was elected mayor, Gray and Onunwor formed a "business relationship," pursuant to which Onunwor received payments from Gray to influence his decisions as mayor and steer municipal contracts to Gray. At monthly meetings, recorded by a surveillance camera in Gray's office, Gray handed Onunwor envelopes containing $700 to $1,000 in cash.

Onunwor testified that payments he received from Gray after his election as East Cleveland's mayor were "bribes" that "influenced [his] decision to make sure that those contracts" went to Gray. Onunwor also testified that he took specific official actions in exchange for the payments. There was overwhelming evidence that Gray's monthly cash payments to Onunwor were funded by entities seeking to obtain or retain contracts with the city.

In one instance, East Cleveland contracted with a local law firm to assist in the collection of overdue income taxes. After Gray discussed the law firm's

contract with Onunwor, Onunwor advised the law firm partners that if they wanted to keep the contract, they needed to work with Gray. Thus, in May 1998, the law firm entered into a "consulting agreement" with Gray, pursuant to which the firm made an initial $2,500 payment to Gray and monthly payments of $1,000 thereafter, for a total of $55,500 during the course of the four-year agreement with Gray. The law firm's tax collection contract continued until 2002, when it was phased out in response to a state audit, which found an alternative, less expensive agency to perform these functions. Four days after the state audit report was issued, the law firm terminated its consulting agreement with Gray.

Gray also approached Onunwor about finding municipal work for another client, Ralph Tyler Company ("RTC"), a Cleveland engineering firm. In response, Onunwor dismissed the company that had an existing engineering contract with the city, replaced it with RTC, and awarded engineering contracts to RTC. After the city's professional services agreement with RTC took effect, Gray increased the amount of his monthly payments to Onunwor to $700. When Onunwor asked Gray for $8,000 to $9,000 to finance a trip to Africa, Gray responded that he would "talk to Ralph [Tyler] about it" and eventually gave Onunwor the money.

Another engineering firm, CH2M Hill ("CH2M") contracted with East Cleveland to run the city's water department after Gray set up the initial meeting between CH2M representatives and Onunwor. Onunwor insisted that the city council approve the contract with CH2M without seeking bids from other companies. From January 2002 through early 2003,

CH2M paid RTC, which had no involvement in the water contract, a monthly fee for "consulting services." RTC passed the payments directly to Gray's company, ETNA Associates. CH2M initially paid RTC $2,000 each month, and RTC added $1,000 from its own account, paying Gray $3,000. The monthly payments from CH2M eventually increased to $10,000, all of which went to Gray. After the city contracted with CH2M, Gray increased his payments to Onunwor to $1,000 each month. A state audit later determined that the city's contract with CH2M cost more than twice as much as it would for the city to operate its water services internally.

This abundant evidence of Gray's illicit transactions with Onunwor and third parties clearly shows that Gray conspired with, and aided and abetted, Onunwor's extortion of "property from another, with [their] consent," by funneling payments from Gray's clients, seeking municipal contracts, to Onunwor while he was acting under color of official right. Thus, the evidence is sufficient to sustain Gray's convictions on Counts 2 through 9 of the superseding indictment.

2. Houston, Texas

Gray's Hobbs Act convictions on Counts 26 through 31, and Jackson's convictions on Counts 26 and 28, stem from their interactions with Monique McGilbra, the Director of Building Services for the City of Houston, Texas, and allegations that Gray and Jackson provided money and gifts to McGilbra in exchange for McGilbra's assistance in securing municipal contracts for Gray's corporate clients and business associates. Count 26 alleged a Hobbs Act

conspiracy between Gray, Jackson, Honeywell Corporation vice-president Brent Jividen, McGilbra, and others, including "Gray's clients" and "Gray's consulting associates," who allegedly provided "things of value, including money, luxury items and food," to Houston public officials McGilbra and Oliver Spellman, in return for official acts intended to benefit Gray, the Gray businesses, Jividen, and Honeywell.

Counts 27, 28, and 29 alleged that favors were provided to McGilbra and her boyfriend, Garland Hardeman, in exchange for official acts. Count 27 related to a Cleveland Browns football weekend provided to McGilbra and Hardeman by Gray and Jividen, in return for her assistance in securing subcontracts from Reliant Energy for Honeywell. Count 28, the only substantive Hobbs Act count on which Jackson was convicted, alleged that Gray, Jackson, and Jividen provided McGilbra and Hardeman with an all-expenses-paid Super Bowl weekend in New Orleans, Louisiana, in exchange for McGilbra's use of her official position to ensure that Honeywell was retained as a subcontractor on a Houston energy contract. Count 29 arose out of Gray's purchase of a Louis Vuitton purse for McGilbra.

At trial, the government presented substantial evidence supporting these charges. From 1993 to 2003, Gray was employed as a consultant by Honeywell and received regular payments under a series of contracts with the company. In 2001, Honeywell expressed an interest in being hired as a subcontractor for Reliant Energy, one of the companies competing for a $180 million contract to provide electricity and energy efficiency services to the City of Houston, Texas. McGilbra, in her official capacity as director of building

services, oversaw the energy contract. Gray invited McGilbra to attend a Cleveland Browns football game in October 2001, telling her that he would take care of all expenses, including accommodations. McGilbra and Hardeman stayed at the Ritz Carlton Hotel, charged a massage and flowers to the room account, and enjoyed a dinner paid for by Gray. The next day, McGilbra and Hardeman attended the football game with Gray and Jividen. During the game, Jividen discussed Honeywell's interest in securing energy contracts through the City of Houston.

Gray thereafter hired Hardeman as a "consultant" to assist Honeywell in obtaining a share of the Houston energy contract. The consulting contract provided that Hardeman would receive half of one percent of the gross revenue that Honeywell received under the energy contract. McGilbra subsequently demanded half of whatever compensation Hardeman received, purportedly because she had directed Hardeman to Gray in the first place. McGilbra thereafter told Reliant's vice-president that she wanted Reliant's proposal to the city to include Honeywell as a subcontractor. Reliant complied and added Honeywell as a subcontractor for demand-side services. McGilbra recommended to the mayor that Reliant be selected as Houston's energy services provider, and Reliant was in fact awarded the contract in December 2001.

The evidence established that Honeywell funded McGilbra's Cleveland weekend. McGilbra testified at the trial that she realized during the football weekend in Cleveland in October 2001 that "this whole thing was sort of a set up" and that Honeywell was involved in paying for the weekend. Her suspicions were correct.

The Cleveland weekend expenses were charged to Honeywell executive Jividen's credit card. McGilbra knew that Hardeman would be compensated under this agreement with Gray and would share the money with her only if Honeywell received payments under the Houston energy contract. McGilbra acknowledged that she used her official position with the City of Houston to ensure that Reliant was awarded the contract and that Honeywell was selected as a subcontractor.

Gray continued to provide McGilbra with favors during the initial phase of the Houston energy contract: he purchased tickets and accommodations for McGilbra and Hardeman to attend the Super Bowl in New Orleans in February 2002, treated McGilbra and her family to a $900 dinner in Florida, and purchased a $700 designer purse for McGilbra. McGilbra testified that after buying the purse, Gray questioned her about the status of Honeywell's Houston contract and expressed concern about possible competition for the contract by another company. Gray submitted the invoices for the Super Bowl tickets and accommodations directly to Honeywell for payment. During this time period, Honeywell was making monthly payments of $5,000 to Gray for his services as a "consultant." The jury heard a taped discussion between Gray and Jividen, during which they talked about McGilbra's expenses for the Super Bowl trip and McGilbra's resultant indebtedness to them as Honeywell representatives.

McGilbra testified that at the time of the Super Bowl, she was supervising the demand-side energy contract in Houston for Reliant Energy and that Honeywell would not make money on the contract until

it reached a second phase. Thus, the jury could reasonably infer that Gray, Jividen, and Jackson provided an incentive to McGilbra, in the form of Super Bowl entertainment, to ensure her cooperation in expediting the contract. This evidence additionally indicated that Honeywell was the source of the funds used by Gray to finance the Super Bowl weekend and to purchase the designer purse for McGilbra.

Although Jackson attempts to minimize his involvement with Gray, McGilbra, and Hardeman during the Super Bowl weekend and suggests that he was merely being hospitable to out-of-town guests, rather than aiding Gray and Jividen in the manipulation of municipal contracts, the government provided substantial evidence that Jackson assisted in the scheme by delivering the Super Bowl tickets to McGilbra's hotel. A taped conversation between Gray and Jackson was played for the jury during the trial. In the conversation, Jackson agreed to host McGilbra during the Super Bowl weekend and told Gray to tell Hardeman that "I'll have his . . . tickets." Jackson also stated that he planned to "try to switch their tickets . . . with somebody," and Gray assured Jackson that "if there's a cost associated with that just let me know and I'll take care of it." Jackson entertained McGilbra and Hardeman by taking them out to dine on more than one occasion, including brunch with the mayor of New Orleans.

Gray paid Jackson a monthly fee to assist Gray in obtaining public contracts for corporate clients, including Honeywell. Gray told Honeywell executive Jividen that he had "Gilbert at 2500." When Jividen responded "that's too much for what he's doing for us right now," Gray insisted that "he has done a lot." In

light of this conversation insinuating Jackson's participation and Jackson's own comments, the jury was "free to disbelieve" the "innocent explanation for the incriminating facts proved by the government." *United States v. Schreane*, 331 F.3d 548, 562 (6th Cir. 2003) (internal quotation omitted).

Contrary to defendants' claims, and unlike *Brock*, where the illegal payments came from defendants' own bank accounts or from their company's bank account, 501 F.3d at 769, the evidence showed that the payments and privileges bestowed upon McGilbra did not originate with defendants. Gray's corporate clients, seeking government contracts, funneled the illegal payments through defendants to McGilbra. We therefore conclude that the evidence was sufficient to sustain defendants' convictions on these counts.

Gray was convicted on two other substantive Hobbs Act counts, Counts 30 and 31, that alleged illegal transactions with Oliver Spellman, the Chief of Staff for Houston's mayor. Count 30 alleged that Gray and "others known and unknown to the Grand Jury, aiding and abetting each other, attempted to and did obstruct, delay and affect commerce and the movement of a good or commodity through commerce through extortion, by Oliver Spellman obtaining under color of official right approximately $2000 in cash from Gray with his consent." Count 31 similarly charged Gray and others with aiding and abetting each other and obstructing commerce through extortion "by Oliver Spellman obtaining, under color of official right, a hotel stay in Las Vegas, Nevada from Gray with his consent."

The evidence bearing on these counts indicates that in 2002, Gray was part of a joint venture, First

Transit, that was bidding for a contract to operate a shuttle service at the Houston airport. Gray was concerned that Houston Mayor Lee Brown might favor a local contractor who was competing for the contract. Gray paid Spellman $2,000 in cash in July 2002 and paid the hotel bill for Spellman's trip to Las Vegas in September. In exchange, Spellman provided Gray with information about the mayor's position on the competing bids for the shuttle contract. Gray also made regular payments to the mayor's brother, Earl Brown. Gray promised Earl Brown an incentive if he talked to the mayor about the shuttle contract; Earl responded that he would "make that phone call." First Transit was eventually awarded the contract.

However, although others were involved in the joint venture with Gray, there was no evidence that the allegedly extortionate payments to and on behalf of Spellman came from a source other than Gray. The proof therefore cannot support the convictions of Gray on Counts 30 and 31, a point that the government concedes. As a result, Gray's convictions on Counts 30 and 31 must be reversed.

3. New Orleans, Louisiana

Gray and Jackson were both convicted on Count 41, which alleges that Gray, Jackson, Jividen, and others, including New Orleans official Vincent Sylvain and Gray's clients, conspired to obstruct commerce by extortion by providing to Sylvain cash payments and things of value, in return for official acts involving the governance of New Orleans.

In early 2002, Honeywell sought a $2.5 million contract to provide energy services to the Housing

Authority of New Orleans ("HANO"). Gray informed Jackson of Honeywell's interest in the contract, and Jackson indicated that he could "get the initial meeting [but] from that point on they gotta talk retainer." Jackson told Gray that "this is money to you and I," to which Gray responded that "we can keep it real clean, real quiet and . . . make some real money."

On February 5, 2002, Gray and Jackson conducted a conference call with Honeywell representatives. Jackson stated that he could arrange a meeting with New Orleans housing officials, including HANO director Benjamin Bell and Sylvain, the mayor's executive director of housing. In a private conversation shortly after the conference call ended, Gray told Jackson that he was going to send Jackson $2,500 to "get this thing going a little bit." Jackson informed Gray that "Vince" in the mayor's office was "the one pushing this for me," and stated, "I'm gonna flip it to him." A $2,500 check was drawn on Gray's ETNA account to Jackson later that day.

Jackson called Gray the next day to report that he had a "great meeting" with Bell, who had agreed to meet with Honeywell's representatives to discuss the contract. Jackson informed Gray that "Vince" had called and that Vince "wants to be . . . part of [a] long term thing." Gray, in turn, assured Jackson that "if it didn't go out yesterday then it went out today for sure." A meeting occurred between Jackson and housing officials, including Vincent Sylvain, but the energy services contract was ultimately not awarded because HANO went bankrupt.

The government concedes, and we agree, that although defendants' intention was to obtain the

contract for Honeywell, it has not been proven beyond a reasonable doubt that Honeywell actually funded the $2,500 payment, as opposed to Gray making the payment in order to develop a potential business opportunity. Because the proofs do not adequately show that Gray conspired with Sylvain to extort "property from another," i.e, an unrelated entity outside of the conspiracy, the reversal of Gray's conviction is required.

For these same reasons, Jackson's conviction on Count 41 is likewise rendered infirm. In light of the deficiencies in the proofs regarding the source of the $2,500 payment, the evidence is insufficient to show that Jackson conspired with Gray, Sylvain, and others to obtain payment "from another" under color of official right and that Jackson served as a conduit for this illegal payment. Consequently, the *Brock* error is not harmless and compels reversal of Jackson's conviction on Count 41.

C.

In their supplemental briefing, defendants argue that, in view of *Brock*, the district court erred by using the word "bribery" in the jury instructions. The government responds to this argument and also suggests that the court may have erred by not reiterating the "from another" language in describing the elements of the offense but asserts that any error was harmless, at least as to most of the counts.

We review a district court's choice of jury instructions for abuse of discretion. *United States v. Ross*, 502 F.3d 521, 527 (6th Cir. 2007). A trial court has broad discretion in drafting jury instructions.

Consequently, an abuse of discretion will be found only if the jury charge fails to accurately reflect the law. *Id.* A judgment may be reversed based upon an improper jury instruction "only if the instructions, viewed as a whole, were confusing, misleading, or prejudicial." *Id.* (internal citation and quotation marks omitted).

Defendants objected to the district court's use of the word "bribery," but did not object to the court's instruction with regard to the "from another" language. When a defendant fails to object to a final instruction, we review the instruction for plain error. *United States v. Blood*, 435 F.3d 612, 625 (6th Cir. 2006).

After explaining the statutory violation of § 1951(a) charged in the indictment, the district court instructed the jury on the statutory definition of "extortion" and twice used the statutory phrase "from another with his consent." The "from another" language was omitted, however, at a later point in the instructions when the court explained the elements of the offense. Certainly repetition of the phrase would have been preferable, and we assume for purposes of our analysis that the failure to include it at the later point was error. We agree with the government, however, that any error was harmless as to the counts of conviction supported by sufficient evidence. As to each of those counts, the government presented abundant evidence from which the jury could infer facts supporting a violation of § 1951(a) under *Brock*, and we find no reason to conclude that a different instruction would have resulted in acquittal.

Similarly, we find no effect on the verdict from the use of the term "bribery" in the jury instructions. The

word was used only fleetingly as a shorthand way of referring to certain of the Hobbs Act charges in the indictment, during the part of the instructions describing the various counts of the indictment. The court did not use the word in its explanation of the law to the jurors, and there was no opportunity for confusion as to what conduct was prohibited by statute. If there was any error in the court's use of the word, it was surely harmless.

D.

In sum, our decision in *Brock* highlights that where, as here, the government charges private individuals with Hobbs Act violations under a color of official right theory, it must satisfy the "property from another" and "with his consent" requirements of § 1951(b)(2). *Brock*, 501 F.3d at 768-69. The government did not meet this burden with respect to the charges against Gray in Counts 30, 31, and 41, and with respect to the charge against Jackson in Count 41. We therefore reverse the convictions on these counts, but affirm the remainder of both Gray's and Jackson's Hobbs Act convictions. Defendants' remaining assignments of error concerning their Hobbs Act convictions are unfounded.

V.

Defendants raise many other issues in these appeals, including challenges to the sufficiency of the evidence regarding their RICO and honest services mail and wire fraud convictions; the district court's denial of motions for severance, continuance, and

mistrial; a *Batson* claim;[12] alleged prosecutorial misconduct; claims of error in jury instructions; and cumulative error. The merits of these claims were meticulously analyzed and properly resolved by the district court in its opinion and order denying defendants' motions for acquittal and/or new trial. *See Gray*, 2005 WL 3059482, at *5-20. Having conducted our own review of the record, we conclude that defendants' contentions are without merit and therefore do not warrant further discussion.

VI.

Gray also challenges his sentences imposed by the district court on several grounds. At his sentencing hearing on November 16, 2005, the district court determined, pursuant to U.S.S.G. § 2C1.1, that Gray's base offense level was 10, added two levels because the offenses involved more than one incident of extortion, and added four more levels based on a finding that Gray was the organizer of extensive criminal activity. *See* U.S.S.G. §§ 2C1.1(b)(1), 3B1.1(a). The district court then increased Gray's offense level by twenty levels under U.S.S.G. § 2C1.1(b)(2)(A), which allows an enhancement of from two to thirty levels when "the value of the payment, the benefit received or to be received in return for the payment, or the loss to the government from the offense, whichever is greatest," exceeds $5,000. The district court determined the loss to the four cities resulting from Gray's crimes and the illegal contracts exceeded $7.5 million "by a substantial amount."

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[12] *Batson v. Kentucky*, 476 U.S. 79 (1986).

Finally, the court imposed a two-level increase for obstruction of justice under U.S.S.G. § 3C1.1, finding that Gray obstructed justice by withholding documents that were responsive to grand jury subpoenas and by presenting perjured testimony at trial. At offense level 38 and a criminal history category I, the resultant advisory Guideline range was 235-293 months' imprisonment. After considering the factors set forth in 18 U.S.C. § 3553(a), the court imposed below-Guidelines sentences of fifteen years of imprisonment on all counts, to be served concurrently.

Five days later, on November 21, 2005, counsel for the government e-mailed the deputy clerk of the court and copied Gray's attorney, to point out that the fifteen-year sentences on the tax evasion and mail/wire fraud charges exceeded the five-year statutory maximum penalty for those offenses. The district court issued an amended judgment that same day, imposing five-year sentences on the tax evasion and mail/wire fraud convictions and reaffirming the fifteen-year sentences on the remaining counts. The court ordered the sentences on all charges to run concurrently, consistent with the original judgment.

Approximately three weeks later, on December 16, 2005, Gray filed an objection to the amended judgment. The district court granted the government's opposing motion to strike defendant's objection to the amended sentences, finding that it had jurisdiction to enter the amended judgment pursuant to Federal Rule of Criminal Procedure 35(a), which permits a court, "[w]ithin 7 days after sentencing," to "correct a sentence that resulted from arithmetical, technical, or other clear error." The district court noted that Gray neither objected to the fifteen-year concurrent

sentences nor requested a separate sentence on any of the individual counts at the sentencing hearing. The district court held that because Gray waited more than seven days to raise an objection to the amended judgment, it no longer had jurisdiction to further amend the judgment under Rule 35(a). Gray's motion for reconsideration was denied by the district court.

In a separately filed appeal, Gray now raises four challenges to his sentences. He contends that: (1) the amount of loss caused by his conduct was improperly calculated and excessive; (2) the loss calculations and resultant enhancement of his sentences were based on impermissible judicial fact finding, in violation of *United States v. Booker*, 543 U.S. 220 (2005); (3) the obstruction of justice enhancement was clearly erroneous; and (4) his sentences were improperly amended.

We review sentencing decisions under a deferential abuse-of-discretion standard for procedural and substantive reasonableness. *United States v. Bolds*, 511 F.3d 568, 578 (6th Cir. 2007) (citing *Gall v. United States*, 128 S. Ct. 586, 594 (2007), and *Rita v. United States*, 127 S. Ct. 2456, 2459 (2007)). "A sentencing court acts unreasonably if it commits legal error in the process of taking the Guidelines or other factors into account, or if it fails to consider them at all." *United States v. Edwards*, 496 F.3d 677, 681 (6th Cir. 2007) (internal citation and quotation marks omitted). "A sentencing court also acts unreasonably if the sentence rests on a finding of fact that is clearly erroneous." *Id.*

We review a district court's loss calculations under the Guidelines for clear error. *United States v. Mickens*, 453 F.3d 668, 670 (6th Cir. 2006). Under

U.S.S.G. § 2C1.1(b)(2)(A), the amount of benefit to be received is an issue of fact subject to clear error review. *United States v. Griffin*, 324 F.3d 330, 365 (5th Cir. 2003). It need not be determined with precision. *Id.* at 366. The value of the benefit received or to be received is "the net value of such benefit." *Id.* (citing U.S.S.G. § 2C1.1(b)(2)(A), comment, (n.2)). Courts must subtract direct costs from the gross value of the contract to determine the net improper benefit. *Id.* "In challenging the court's loss calculation, [a defendant] must carry the heavy burden of persuading this Court that the evaluation of the loss was not only inaccurate, but outside the realm of permissible calculations." *United States v. Hamilton*, 263 F.3d 645, 654 (6th Cir. 2001).

Here, the district court determined that the loss resulting from Gray's crimes included: (1) CDM's $742,000 profit on its Cleveland water contracts that totaled $14,840,000; (2) $3.9 million owed to CH2M as aggregate "management fee" under its water contract with East Cleveland; (3) $275,920, the differential between the amount the law firm charged and the amount the governmental agency would have charged for collecting delinquent taxes under East Cleveland's tax collection contract; (4) $2 million in anticipated profits under Honeywell's proposed $20 million contract to provide energy services to HANO, based on a ten percent profit Honeywell expected to receive on the $20 million contract; (5) $675,000 in profits under Honeywell's $8-10 million energy services contract with Houston; and (6) $647,732 for First Transit's contract to provide shuttle services at the Houston airport.

In arriving at these calculations, the district court opined that "there is strong evidence that . . . the loss

was greater," and we agree. If there is an infirmity in the loss calculations, it is not undue inflation of the losses, but underestimation. We find no clear error in the court's method of calculation or its determination of the losses incurred by the four cities as a result of Gray's conduct.

The district court's two-level enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1 is likewise not clearly erroneous. The district court imposed the enhancement based upon its finding that Gray obstructed justice by withholding documents that were responsive to grand jury subpoenas and by introducing the perjured testimony of a former partner of the law firm implicated in the East Cleveland scheme to obtain a tax-collection contract. Both of these findings were supported by the record, and either finding provided sufficient justification for application of the obstruction of justice enhancement. *United States v. Carter*, 510 F.3d 593, 597 (6th Cir. 2007); *United States v. Jackson-Randolph*, 282 F.3d 369, 390 (6th Cir. 2002).

Defendant's next contention that the district court impermissibly relied upon judicially found facts regarding the alleged losses in enhancing his sentences is meritless in light of our recurring conclusion that "district judges can find the facts necessary to calculate the appropriate Guidelines range using the same preponderance-of-the-evidence standard that governed prior to *Booker*." *United States v. Ferguson*, 456 F.3d 660, 665 (6th Cir. 2006) (citing *United States v. Stone*, 432 F.3d 651, 654-55 (6th Cir. 2005)). The enhancements here were based on permissible fact finding and were not outside of the bounds of the court's authority.

Finally, although "the authority conferred by [Federal Rule of Criminal Procedure] 35(a) to a district court is extremely limited," *United States v. Arroyo*, 434 F.3d 835, 838 (6th Cir. 2006), we conclude that the district court acted within the scope of Rule 35(a) when it amended Gray's sentences, four days after entry of the original judgment, to correct its error in imposing a sentence greater than the allowable statutory maximum on the tax evasion and mail/wire fraud counts.[13] *Cf. United States v. Gruenberg*, 53 F.3d 214, 215 (8th Cir. 1995), and *United States v. Jordan*, 895 F.2d 512, 514-16 (9th Cir. 1990) (both permitting correction of sentences under former Rule 35(a) to eliminate illegal excess beyond statutory maximum, so long as correction did not make sentence more onerous). The only effect of the amended judgment in this case was to reduce Gray's sentences on the tax and fraud counts by ten years, without altering his total term of imprisonment. Accordingly, the amendment was not invalid under Rule 35(a). Gray's sentences on all counts except 30, 31, and 41 (which are vacated in light of our reversal of his convictions on these counts) are therefore affirmed.

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[13] As we noted in *Arroyo*, Rule 35(a) "is not intended to afford the court the opportunity to change its mind about the appropriateness of the sentence . . . [or] used to reopen issues previously resolved at the sentencing hearing through the exercise of the court's discretion with regard to the application of the sentencing guidelines." *Arroyo*, 434 F.3d at 838 (internal citation and quotation marks omitted). Neither of these concerns is present here.

VII.

In conclusion, for the reasons stated above, we reverse Gray's convictions as to Counts 30, 31, and 41 of the superseding indictment. We affirm Gray's convictions and sentences pertaining to all remaining counts. We reverse Jackson's conviction on Count 41 only, but affirm in all other respects. Accordingly, we affirm in part, reverse in part, and remand both defendants' cases for resentencing consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

CASE NO. 1:04-CR-580

[Filed June 6, 2005]

UNITED STATES OF AMERICA, Plaintiff,	)
v.	)
NATHANIEL GRAY, et al., Defendants.	)

ORDER AND OPINION
[Resolving Doc. Nos. 225, 227, 230, 265]

JAMES S. GWIN,
UNITED STATES DISTRICT JUDGE:

Before the Court is Defendant Gray's Motion to Suppress All of the Title III Intercepts seized pursuant to the Omnibus Crime Control and Safe Street Act of 1968 ("Title III"), 18 U.S.C. §§ 2510-2520. [Doc. No. 227]. Defendants Monique McGilbra, Joseph Jones, and Gilbert Jackson joined Gray's motion to suppress. [Doc. No. 225, 230 & 265]. The Government opposes these motions. [Doc. Nos. 235 & 239]. For the following

reasons, the Court **DENIES** Defendant Gray's motion to suppress.

I. FACTUAL BACKGROUND

Defendant Gray generally contends that evidence obtained through the Title III intercepts should not be received because of claimed failures to comply with formalities associated with the application process. With this argument, Gray points to the Government's failure to identify the Department of Justice ("DOJ") official who authorized the Title III application, failure to attest to the applications, and failure to include the name of the authorizing DOJ official in the Title III Order. In addition, Gray complains that insufficient evidence supported the Title III applications and argues that investigating authorities failed to minimize the wiretap's intrusiveness.

The wiretaps originated with a January 15, 2002, application submitted by David A. Sierleja, an attorney of the DOJ. Sierleja made the application as an investigative or law enforcement officer under Title III.[1] The January 2002 application has several defects. First, Sierleja had received approval for the application from Deputy Assistant Attorney General Malcolm, who is a specially-designated official authorized to review and approve Title III wiretaps. However, the January 15, 2002, application does not identify the specially-

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[1] An "investigative or law enforcement officer" is defined as "any officer of the United States or of a State or political division thereof, who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses." 18 U.S.C. § 2510(7).

designated Justice Department official who approved the application. The Title III application also does not include a copy of the letter from the specially-designated DOJ official that approved the intercept. In addition, the January 15, 2002, application was not sworn under oath or affirmation, and it does not indicate the time when AUSA Sierleja executed it. Sierleja filed the application on January 16, 2001.

On January 16, 2002, Judge Oliver reviewed the application and issued an order granting an application to commence a thirty-day Title III wiretap of Gray's various phone business and cellular phone numbers. Like the application, the order does not identify the Justice Department official who approved the application.[2]

Following the expiration of the thirty-day period, the Government sought to renew the wiretap. In applying to renew the wiretaps, however, the Government failed to comply with the statutory requirement that specially-designated DOJ official approve the renewal application. A district court judge granted the application. After later appreciating that the Government had not obtained necessary approval from any authorized Justice Department official, the Government self-suppressed the tainted interceptions from the unauthorized renewal applications, spanning from February 15, 2002 to May 13, 2002. Gov't Br., Dkt 239, at 31.

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[2] The application and the order were filed under seal by the district court.

Seeking to correct the problem associated with the interceptions from February 15, 2002 through May13,2002, the Government filed a new Title III wiretap application on July 30, 2004, regarding the same phone numbers. Correcting the problems in the earlier applications, the July 30, 2002, application identifies the authorizing official and attaches two exhibits: the DOJ letter specially designating the authorizing official and the authorizing official's letter approving the July 30, 2002 intercept.[3] In attempting to show probable cause for this July 30, 2002, application, the Government repeated many of the probable cause allegations that were contained in its January 16, 2002 application. However, the Government also added evidence intercepted in the January 16, 2002 through February 14, 2002 period of wiretaps and evidence derived independently. Judge Matia approved the application on July 30, 2002, and the clerk's office filed the documents under seal.

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[3] In contrast, the July 30, 2002 application clearly identified the officer authorizing the application: "Pursuant to Section 2516 of Title 18, United States Code, the Attorney General of the United States has specially designated the Assistant Attorney General in charge of the Criminal Division and any Deputy Assistant Attorney General of the Criminal Division to exercise the power conferred on the Attorney General by Section 2516 of Title 18, United States Code, to authorize this application. Under the power designated him by special designation of the Attorney General pursuant to Order Number 2407-2001 of March 8, 2001, an appropriate official of the Criminal Division has authorized this application. Copies of the Attorney General's order of special designation and the Memorandum of Authorization approving this application are attached to this application as Exhibits 1 and 2, respectively." Application of July 30, 2002, at ¶ 3. Additionally, the exhibits to the July 2002 Application included the July 30, 2002 letter from the authorizing officer.

II. PROCEDURAL BACKGROUND

On November 19, 2004, the Grand Jury issued an indictment as to Joseph Jones. On January 14, 2005, the Grand Jury issued a superseding indictment, adding Monique McGilbra, Nathaniel Gray, and Gilbert Jackson among others. Defendant Gray filed the instant motion under seal on April 22, 2005. Trial is set to begin on June 13, 2005.

On April 28, 2005, the Court conducted a suppression hearing. The clerk of the court testified, and counsel examined the applications and orders for the intercepts authorized in January 2002 and July 2002.

On May 3, 2005, the Court reconvened the suppression hearing. Although the Defendants had earlier sought to compel the testimony of Judge Oliver, the district court judge who had authorized the January 15, 2002, wiretaps, they withdrew their subpoena. At the May 3, 2005, reconvened hearing, the Government proffered that, if required, Judge Oliver would testify, that he was aware that the Government had obtained approval for the January 15, 2002, wiretap application before he signed the order.

On May 3, 2005, the Government filed a motion requesting the Court to accept the Government's proffer, or, in the alternative, to reopen the hearing to allow AUSA Sierleja to testify. The Court granted the motion to reopen the hearing and on May 9, 2005, the Court held a hearing on the Government's motion. The Court orally denied the Government's motion to accept the proffer.

After denying the Government's motion to accept the proffer, the Court reopened the hearing. On May 9, 2005, AUSA Sierleja testified. Sierleja stated that at the time that he originally applied for the Title III intercept, he told Judge Oliver "that there was a review process [in the Justice Department] and ultimately an approval for that before we submitted anything to him." Sierleja further explained that he had earlier obtained authorization from a specially-designated DOJ official before submitting the application to Judge Oliver for approval. It is not clear from the record whether Sierleja informed Judge Oliver of the name of the authorizing official or whether he merely informed Judge Oliver that he had obtained approval. When he met with Judge Oliver, Sierleja had Malcolm's letter approving the application with him, but he did not show the authorizing letter to Judge Oliver.

III. DISCUSSION

In moving to suppress the Title III wiretaps, Defendant Gray advances numerous arguments. Gray argues that the January 2002 intercepts should be suppressed because the application and order were flawed in several respects. Gray's primary argument is that the Court should suppress the January 2002 intercepts because the application and the order that authorized the wiretaps omitted the identity of the high ranking Justice Department official who approved the interception. Additionally, Gray maintains that the intercepts should be suppressed and argues that insufficient evidence shows that Sierleja obtained approval from a specially-designated Justice Department official for the January 2002 and July 2002 applications. Gray further asserts that the

January 2002 intercepts should be suppressed because Sierleja did not swear the application under oath or affirmation. Gray next asserts that *all* of the intercepts should be suppressed because the application and order did not support a finding of probable cause and a finding that electronic surveillance was necessary for the investigation. Gray additionally claims that the Government failed to minimize the interception of non-pertinent communications. Gray contends that the Government failed to terminate the surveillance after the period necessary to achieve the objective of the authorization. As another argument, Gray maintains that the Government failed to timely disclose the surveillance. In addition to arguing that the Title III violations warranted suppression, Defendant Gray argued that all of the violations cumulatively required suppression.

The Government opposes Defendant Gray's motion. For the reasons discussed below, the Court denies Defendant Gray's motion.

Title III sets out requirements for receiving permission to intercept wire communications and provides for suppressing interceptions "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. A defendant may move to suppress the intercepted communications on three statutory grounds:

> (i) the communication was unlawfully intercepted;
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

> (iii) the interception was not made in conformity with the order of authorization or approval.

18 U.S.C. § 2518(10)(a). Although Title III allows for suppression of communications intercepted in violation of the statute, the Supreme Court has cautioned that "suppression is not mandated for every violation of Title III." *United States v. Chavez*, 416 U.S. 562, 575 (1974).

A. Authorization by a Specially-Designated Official, 18 U.S.C. § 2516(1)

Defendant Gray argues that the January 2002 and July 2002 intercepts should be suppressed because a high-ranking Justice Department official failed to approve the applications in violation of Section 2516(1).

In this case, the authorization letters for both the January and July intercept applications include the typed name of Michael Chertoff, *Assistant Attorney General, Criminal Division, Department of Justice,* but Deputy Assistant Attorney General John Malcolm signed the letters. Gray argues that this violates Section 2516(1) and that the intercepts should be suppressed. As to both the January 2002 and July 2002 intercepts, Gray highlights the fact that the authorization letters were seemingly drafted under Chertoff's name, but they bear the signature of Deputy Assistant Attorney General Malcolm. Additionally, as to the January 2002 application, Defendant Gray argues that it is not clear which high-ranking DOJ official authorized the interception, if any. Gray's arguments fail.

Title III requires a specially designated official to approve applications for the interception of wire or oral communications. 18 U.S.C. § 2516(1). Failure to obtain authorization before submitting an application to a district judge constitutes grounds for suppression. *See* 18 U.S.C. § 2518(10)(a). The Supreme Court has observed that Title III "plainly calls for the prior, informed judgment of enforcement officers desiring court approval for intercept authority, and investigative personnel may not themselves ask a judge for authority to wiretap or eavesdrop. The mature judgment of a particular, responsible Department of Justice official is interposed as a critical precondition to any judicial order." *United States v. Giordano*, 416 U.S. 505, 515 (1974). The requirement in Section 2516(1) "was designed to insure that *decisions to wiretap* were made by the named officials and did not reach into the lower echelons of command." *United States v. Lambert*, 771 F.2d 83, 90 (6th Cir. 1985) (internal quotation marks omitted), *cert. denied*, 474 U.S. 1034 (1985).

First, Gray argues that Deputy Assistant Attorney General Malcolm was not specially designated and that no one authorized the January 2002 and July 2002 applications. Despite Gray's assertions, the Court finds that Deputy Assistant Attorney General Malcolm was specially designated to approve Title III intercept applications. On March 8, 2001, Order No. 2407-2001 from Attorney General John Ashcroft designated any Deputy Assistant Attorney General of the criminal division as having authority to approve wiretap applications. Thus, Malcolm had authority to authorize Title III intercept applications. Furthermore, the Court finds that Deputy Assistant Attorney General Malcolm authorized the January 2002 and July 2002

applications. *See United States v. Florea*, 541 F.2d 568, 573-74 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977). The Government introduced letters approving the specific January 2002 and July 2002 intercept applications at issue in this case, and both letters had Malcolm's signature.

Because both the January 2002 and July 2002 had actual approval from a high-ranking DOJ official with authority, the applications comply with Section 2516(1). Because Malcolm had authority to approve interception applications under Section 2516(1), he "is presumed to have properly exercised that power and the condition[s] precedent [are] presumed to have been met unless the defendants offer evidence, apart from mere conjecture or speculation, to rebut this presumption." *See United States v. O'Connell*, 841 F.2d 1408, 1416 (8th Cir. 1985) (internal quotation marks omitted), *cert. denied*, 487 U.S. 1210 (1988); *see also United States v. Ceballos*, 302 F.3d 679, 685 (7th Cir. 2002) (holding that defendant failed to establish that the Deputy Assistant Attorney General lacked authority where the person stated that her title was Deputy Assistant Attorney General and the government provided an executive order designating any Deputy Assistant Attorney General as authorized), *cert. denied*, 537 U.S. 1136 (2003).

As to the January 2002 and July 2002 applications, the Court finds that Defendant Gray has failed to introduce sufficient evidence to establish a dispute in the authenticity of Deputy Assistant Attorney General Malcolm's authorizations.

Gray argues that the intercepts should be suppressed because the authorization letters were

drafted for Chertoff but signed by Malcolm. However, this argument is not sufficient to impugn the authenticity of the Malcolm's authorization letters. The Government has established that Deputy Assistant Attorney General Malcolm had authority to approve the interceptions at issue in this case. That the authorization letter was drafted for signature by Assistant Attorney General Chertoff is irrelevant because the Court presumes that Malcolm properly exercised his authority in approving the intercept applications. *See United States v. Monarrez-Cano,* No. 8:01CR273, 2002 U.S. Dist. LEXIS 12561, at **5-6 (D. Neb. July 10, 2002) (denying a motion to suppress when Deputy Assistant Attorney General Swartz signed the authorization letter, which was drafted for Chertoff's signature). Gray's argument is insufficient to rebut the presumption that Malcolm properly exercised his authority.

Defendant Gray next argues that Deputy Assistant Attorney General Malcolm's signatures on the January and July authorization letters not actual signatures, but were stamps. The Government contends that simply comparing Malcolm's two signatures shows that they were his actual signature and not a stamp. At the hearing, Defendant Gray has conceded as much, and he abandoned this argument. Even if Gray still maintained that Malcolm's signatures were stamps, which they do not appear to be, the Court will not infer that the Government failed to secure authorization solely because the DOJ official's signature was a stamp. *See United States v. Citro*, 938 F.2d 1431, 1436 (1st Cir. 1999) ("We decline to find that the fact that Keeny's signature was stamped rather than originally signed suggests that neither Keeny nor Dennis (both properly designated officials), authorized the intercept

application."). To dispute the authenticity of an official's signature approving a wiretap application, more evidence than mere speculation is necessary. *Accord United States v. De le Fuente*, 548 F.2d 528, 532 (5th Cir. 1977) ("Requiring that the government 'prove up' the authorizing signature . . . every time it wishes to introduce wiretap evidence at a criminal trial would insure a field day for captious and costless technical objections.").

Accordingly, the Court rejects Defendant Gray's arguments that the January 2002 and July 2002 applications should be suppressed because the Government failed to obtain approval from a specially designated DOJ official as Section 2516(1) requires.

B. Failure to Make Application Upon Oath or Affirmation to a Judge, 18 U.S.C. § 2518 (1)

Additionally, Gray maintains that the January 2002 interceptions should be suppressed because the application was facially insufficient since it was not made upon oath or affirmation as Section 2518(1) requires.

The Government argues that Title III does not require that the district judge to confirm that the AUSA made his application under oath both in the application *and* order. The Government argues that Defendant Gray has not presented sufficient evidence to dispute Judge Oliver's finding that Sierleja provided his application under oath. The January 2002 application recites that Sierleja, as the applicant, has "been duly sworn." The Government highlights that the order granting the application finds that the "[a]pplication under oath having been made before me

by [the AUSA] . . . an investigative or law enforcement officer of the United States within the meaning of Title 18 United States Code, Section 2510(7)." Additionally, the FBI agent swore to its contents of her affidavit in the district judge's presence.

Title III requires the application for an intercept to be "made in writing upon oath or affirmation." 18 U.S.C. § 2518(1). The Sixth Circuit has held that a written application and the special agent's sworn oral statements were sufficient to satisfy the oath or affirmation requirement. *United States v. Florea*, 541 F.2d 568, 576 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977).

The January 2002 application states that it has been "duly sworn," but the last page was not signed by Judge Oliver, which would indicate that Sierleja made the application under oath or application. Assuming that this constitutes a violation of the oath or affirmation requirement, this violation is not grounds for suppressing the intercepted communications. Defendant Gray has failed to show that suppression is warranted for failure to comply with the oath or affirmation requirement of Section 2518(1). The Supreme Court has instructed that "suppression is not mandated for every violation of Title III." *United States v. Chavez*, 416 U.S. 562, 574-75 (1974). The January 2002 order from Judge Oliver, which approved Sierleja's application, states that Sierleja made the application under oath. This is more than sufficient to satisfy the oath or affirmation requirement of Section 2518(1). Suppression is not warranted on this ground.

C. Identification Requirements in the Authorizing and Order, 18 U.S.C. §§ 2518 (1)(a), (4)(d)

It is undisputed that the January 2002 application and order violated the identification requirements of Section 2518(1)(a) and Section 2518(4)(d). Title III requires both the application and order to include the name of the high-ranking DOJ official who authorized the wiretap application.[4] 18 U.S.C. §§ 2518(1)(a), (4)(d). Because the January 2002 application and order omitted the identity of the authorizing official, the January 2002 application and order were facially insufficient, which the Government concedes. The issue is whether these violations require complete suppression, and suppression is not required if the Title III violation "does not establish a substantive role to be played in the regulatory system." *See Chavez*, 416 U.S. at 578.

Gray maintains that the identification requirements are central to the statutory purpose of Title III and that the omission of the official's name warrants complete suppression of the January 2002 intercepted communications as a remedy.[5] In contrast,

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[4] Each intercept application must include the "identity of the investigative or law enforcement officer making the application, **and** the officer authorizing the application." 18 U.S.C. § 2518(1)(a) (emphasis added). Likewise, as to the order from the judge, Congress required that each order approving the interception of wire communication "shall specify . . . the identity of . . . the person authorizing the application." 18 U.S.C. § 2518(4)(d).

[5] Defendant Gray does not specify which statutory prong requires suppression. *See* 18 U.S.C. § 2518(10)(a). Under these facts, Gray could argue either that the intercepts should be suppressed either because the communications were unlawfully intercepted or

the Government contends that the omission constitutes a mere technical defect that does not warrant suppression because Deputy Assistant Attorney General Malcolm, in fact, authorized the intercept application, and he had authority to do so.

Both parties urge this Court to interpret *Chavez* to govern this case in conflicting ways. For example, the Government argues that *Chavez* stands for the rule that violation of the identification requirements of Title III are mere technical defects that do not warrant suppression, regardless of whether the application misidentified the authorizing official or omitted his name entirely. *See United States v. Chavez*, 416 U.S. 562, 577-78 (1974) ("While adherence to the identification reporting requirements of §§ 2518(1)(a) and (4)(d) thus can simplify the assurance that those whom Title III makes responsible for determining when and how wiretapping and electronic surveillance should be conducted have fulfilled their roles in each case, it does not establish a substantive role to be played in the regulatory system."); *see also United States v. Acon*, 513 F.2d 513, 517 (3d Cir. 1975) (citing *Chavez*, 416 U.S. at 578) (same). On the other hand, Gray argues that the Supreme Court, in *Chavez*,

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because the January 2002 order was insufficient on its face. 18 U.S.C. §§ 2518(10)(a)(I), (ii). Practically, courts have applied the same analysis to cases where the Government misidentified the authorizing official, regardless of whether the defendant argued that it was facially insufficient or that the communication was unlawfully intercepted. *United States v. Radcliff*, 331 F.3d 1153, 1162 (10th Cir. 2003) (listing cases), *cert. denied*, 540 U.S. 973 (2003); *United States v. Vigi*, 515 F.2d 290, 293 (6th Cir. 1975), *cert. denied*, 423 U.S. 912 (1975). Thus, regardless of Gray's theory of suppression, the result is the same.

recognized a distinction between misidentification and omission of the official's name. *See Chavez*, 416 U.S. at 573-74 (rejecting the lower court's conclusion that "an order incorrectly identifying who authorized the application is equivalent to an order failing to identify anyone at all as the authorizing official" and instead concluding that "[i]n no realistic sense . . . can it be said that the order failed to identify an authorizing official" because the application and order identified an Assistant Attorney General with authority to approve wiretap applications, even though he did not actually approve the application at issue).

After examining the Supreme Court's decision in *Chavez*, the Court concludes that *Chavez* did not resolve the issue present in this case. Both parties urge this Court to extend the holding of *Chavez* to the facts of this case, and they extract seemingly conflicting dicta from *Chavez* to support their positions. Neither party's interpretation of *Chavez* persuades the Court. In *Chavez*, the application misidentified the authorizing official: the application identified the Assistant Attorney General when the Attorney General actually approved it. The Supreme Court has not resolved the issue presented in this case, nor has the Sixth Circuit has not ruled on it. Therefore, the Court needs to decide whether omitting the authorizing official's name from the application and order warrants suppression of the intercepted

communications.[6] The Court will analyze the issue under the test provided in *Chavez* and *Giordano*.

After careful consideration, the Court concludes that the omission of Malcolm's name, while not proper practices, does not warrant suppression.[7] In concluding that suppression is not appropriate, this Court is influenced by several facts to find that the violations of both Section 2518(1)(a) and Section 2518(4)(d) do not undermine the central statutory purpose of Title III. *Cf. Chavez*, 416 U.S. at 575 (concluding that misidentification "did not affect the fulfillment of any of the reviewing or approval functions required by Congress"). Malcolm actually approved the January 2002 application and Judge Oliver had notice that a specially-designated official approved the application.

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[6] The Court found only one reported case in the federal courts considering facts similar to these, namely the omission of the Justice Department official's name. *United States v. Callum*, 404 F.3d 1150, 1155 (9th Cir. 2005). In *Callum*, the Ninth Circuit concluded, with little analysis, that omitting the name of the authorizing official was analogous misidentifying him. *See id.*. However, the Ninth Circuit did not analyze whether the district court had notice that a Justice Department official approved the application.

[7] In relying upon the specific circumstances of this case to deny Gray's suppression motion, the Court need not subscribe to the Government's theory that a misidentification is *worse than* the omission of any identification at all. Even if the application or order misidentifies the DOJ official, the identification of a person fixes some authority with that person, which subsequently may be corrected upon discovery that he was not the official who authorized the intercept application. In this sense, omission is arguably worse than identification because neither the application nor order fix responsibility with any higher-level DOJ official because both omitted the name of the authorizing official.

Furthermore, Defendant Gray was not prejudiced by the omission of Malcolm's name from the application and order because Defendant Gray was able to examine the authorization letters for their authenticity at the suppression hearing. The Court analyzes the two violations separately.

1. *Identification Requirement in the Application,* Section 2518(1)(a)

As to the Government's failure to include Malcolm's name in the application, the Court concludes that the Government's conduct, while violating Section 2518(1)(a), satisfied the central purpose of the identification requirement because Malcolm actually approved the application at issue, and Judge Oliver had notice that the Justice Department had approved the application. Before submitting the intercept application, Sierleja actually received authorization from a specially-designated Justice Department official. On January 14, 2002, Malcolm approved the January 2002 application. Two days later, on January 16, 2002, Sierleja presented the wiretap application to Judge Oliver. Because the Justice Department authorized the January 2002 application before Sierleja submitted it, this suggests that the wiretaps should not be suppressed. *See United States v. Reyna*, 218 F.3d 1108, 1112 (9th Cir. 2000) (suppressing wiretaps because the Government brought the application before receiving approval, even though the application contained a general paragraph regarding authorization and the government told the issuing judge that approval was on its way and approval arrived by facsimile one hour later).

Sierleja told Judge Oliver that a Justice Department official approved the January 2002 intercept application, which gave the district judge notice that a specially-designated official reviewed the application. The purpose of Title III's identification requirements is to ensure accountability by a high-level executive official. *See United States v. Radcliff*, 331 F.3d 1153, 1162 (10th Cir. 2003), *cert. denied*, 540 U.S. 973 (2003); S. Rep. No. 1097, 90th Cong. 2d 101, at 572 (1968) (noting that Section 2518(1)(a) requires the application to include the name of the authorizing official because "this fixes responsibility").

Because the procedures employed in this case sufficiently fixed responsibility with the Justice Department, which satisfies the underlying purpose of the identification requirement, suppression is not warranted for omitting Malcolm's name from the application. Since Judge Oliver had notice that approval had been earlier received, this case resembles misidentification cases where courts refused to suppress the intercepted conversations when an authorizing official in fact approved the application because the courts emphasized that the court had notice that the Justice Department authorized the application. *See, e.g., United States v. O'Connell*, 841 F.2d 1408, 1416 (8th Cir. 1988) (holding that misidentification in the application was insufficient to suppress wiretaps when the authorization letter was attached to the application and the court knew of the inconsistency). Even though Judge Oliver did not seem to know the name of the authorizing official, the result is not changed because a district court's determination whether to approve an intercept application is independent from the identity of the authorizing official. *See United States v. Acon*, 513 F.2d 513, 517

(3d Cir. 1975) (concluding that the name of the authorizing official was "not as likely" to affect the judicial determination of whether to approve an application for an intercept than the determination of the facts, such as probable cause). Because Judge Oliver knew that someone from the Justice Department had previously approved the January 2002 application, the Government accomplished the statutory purpose of fixing responsibility.

In light of all of the circumstances of the January 2002 application, the Court concludes that the omission of Malcolm's name from the application does not violate a substantive provision of the statute under these facts.

2. *Identification Requirement in the Order*, Section 2518(4)(d)

As to the omission of Malcolm's name from the order, the Court concludes that this violation of Section 2518(4)(d) does not warrant suppression. The Court finds that the circumstances in this case sufficiently fixed responsibility within the Justice Department, which is the purpose of Title III's identification requirement as to the order. *See* S. Rep. No. 1097, 90th Cong. 2d 101, at 572 (noting that Section 2518(4)(d) requires the order to identify the person authorizing the application "so that responsibility will be fixed").

The omission of Malcolm's name from the order, although violating 18 U.S.C. § 2518 (4)(d), is not central to the statutory purpose of Title III. Other courts have concluded that violation of the identification requirement in Section 2518(4)(d) constitutes a mere technical defect, regardless of

whether the order omitted the name of the authorizing official or misidentified him. *See United States v. Radcliff*, 331 F.3d 1153, 1163 (10th Cir. 2003) (concluding that suppression was not required when an authorized person in fact approved the application, the judge knew the official's identity, and the defendant knew the identity after he was indicted), *cert. denied*, 540 U.S. 973 (2003); *United States v. Lawson*, 545 F.2d 557, 562 (7th Cir. 1975) (holding that the purpose of Section 2518(4)(d) was not undermined where the order named an official without statutory authority, but the attorney general had in fact authorized the application because "the general purpose of the statute has been preserved"); *United States v. Acon*, 513 F.2d 513, 519 (3d Cir. 1975) (concluding that suppression was not required for violating Section 2518(4)(d) because the facts as they actually existed showed substantial compliance with the statute). Because Judge Oliver had notice that an official from the Justice Department approved the application, the Court concludes that the Government's omission of Malcolm's name from the order constituted a mere technical defect.

Furthermore, the Court cannot discern any resultant prejudice to Defendant Gray arising from the violations of the identification requirements, which further suggests that suppression is not warranted under these facts. *See United States v. Vento*, 533 F.2d 838, 860 (3d Cir. 1976) (concluding that attaching a copy, rather than the original, of the authorization letter constituted a technical defect because no prejudice occurred when the original document was available at the suppression hearing). Malcolm in fact authorized the January 2002 application and had authority to do so. Failure to include the identity of the

authorizing officer in the application and order, while not best practices and a clear violation of Title III, "does not establish a substantive role to be played in the regulatory system." *Chavez*, 416 U.S. at 578. The Court agrees that "suppression is not required for facial insufficiency relating to less critical requirements which may be varied by subsequent affidavits." *United States v. Acon*, 513 F.2d 513, 517 (3d Cir. 1975) (permitting affidavits first presented at the suppression hearing to demonstrate that an appropriate official actually authorized the application).

Thus, the Court concludes that the omission of Malcolm's name from the order constitutes a mere technical defect that does not warrant suppression on this basis.[8]

In light of the facts in this case, violation of the identification requirements does not play a central role in the statutory scheme.[9] Defendant Gray is not entitled to suppression for the omission of Malcolm's name from the application and order.

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[8] Gray further argues that these violations, when combined with the other Title III violations, warrant suppression of all Title III intercepts. The Court does not find this argument persuasive. Neither the individual violations alone nor the cumulative effect of all of the violations warrants the drastic remedy of complete suppression.

[9] In determining whether the omission of the official's name does not warrant suppression in this case, the Court confines its analysis to the facts before it. The Court does not determine whether suppression may be warranted under different facts.

D. Judicial Factual Findings

Under Title III, a judge may issue an order permitting the interception of wire, oral, or electronic communications if the "judge determines on the basis of the facts submitted by the applicant that–

> (a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense . . . .
> (b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;
> (c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;
> (d) . . . there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense.

18 U.S.C. § 2518(3).

Defendant Gray challenges the district court's findings that the probable cause existed for the Title III interception and that normal investigative procedures reasonably appeared unlikely to succeed.

1. Probable Cause

Gray contends that the Government failed to establish probable cause for the Title III intercepts as

to the January 2002 application. Gray argues that each subsequent affidavit relied in part on the information gathered from the first affidavit, and he contends that all evidence subsequently obtained should be suppressed. Gray further argues that the information in the July 2002 affidavit is stale because the allegations were more than six months old and Gray had no relationships with the new city officials after the city administration changed in January, 2002.

In contrast, the Government contends that more than a substantial basis supports the district judges' probable cause determination as to the January 2002 and July 2002 wiretaps. Furthermore, the Government claims that the allegations in the July 2002 affidavit were not stale because the alleged criminal activity was ongoing and permanent.

To warrant suppression for failing to find probable cause, Defendant Gray must show that the district judge abused his discretion in approving the application. *See United States v. Alfano*, 838 F.2d 158, 163 (6th Cir. 1988). Defendant has not met this burden. The Court finds that neither Judge Oliver nor Judge Matia abused his discretion in approving the applications because the respective affidavits support a finding of probable cause.[10]

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[10] Even if probable cause were lacking, which it is not, Defendant Gray would still not prevail. The drastic remedy of suppression is proper only where: (1) the judicial officer issuing the warrant "abandoned his detached and neutral role;" (2) the officers were "dishonest or reckless in preparing their affidavit" supporting the issuance of the wiretap order; or (3) the agents "could not have harbored an objectively reasonable belief in the existence of probable cause." *United States v. Leon*, 468 U.S. 897, 926 (1984);

In determining whether probable cause was established, the Court examines the application under the totality of the circumstances in a "reasonable fashion and common sense manner." *United States v. Alfano*, 838 F.2d 158, 161 (6th Cir. 1988). The Court accords "great deference" to the issuing judge's determination of probable cause because "[r]easonable minds frequently may differ on the question whether a particular affidavit established probable cause." *United States v. Giacalone*, 853 F.2d 470, 479 (6th Cir. 1988), *cert. denied*, 488 U.S. 910 (1988); *Alfano*, 838 F.2d at 162. Even if a subsequent trial judge or reviewing court arrives at a different conclusion, suppression of the evidence is not required or warranted. *See Alfano*, 838 F.2d at 162. Thus, the Court upholds the finding of probable cause if the record contains a "substantial basis for . . . Concluding that probable cause existed." *United States v. Lambert*, 771 F.2d 83, 92 (6th Cir. 1985) (internal quotation marks omitted), *cert. denied*, 474 U.S. 1034 (1985).

The Court finds that a substantial basis exists for Judge Oliver's finding of probable cause to believe that the alleged crimes were committed and would continue through the use of the telephones. While the Court will not summarize the extensive allegations from the Special Agent Christine Oliver's affidavit, the Government amply described the affidavit's allegations as to CS-1, CS-2, and CS-3. The Court finds that the affidavit includes a sufficient basis for reliability and veracity. Given the detailed nature of the allegations, the affidavit provides more than a substantial basis for

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United States v. Giacalone, 853 F.2d 470, 479-80 (recognizing that the principle from *Leon* applies to Title III cases).

probable cause to believe that Gray committed the alleged crimes over the phone lines and would continue to do so.

The Court further finds that a substantial basis exists for Judge Matia's finding that probable cause existed based upon the affidavit submitted on July 30, 2002 by Special Agent Clyde Wallace III, which included evidence obtained from the first thirty-day interception period and other evidence derived independently. In according great deference to Judge Oliver's and Judge Matia's findings, the Court upholds the determination of probable cause because the record demonstrates a substantial basis for concluding that probable cause existed.

Gray advances two other arguments concerning the July 2002 affidavit. He argues that the affidavit contained stale allegations because they were more than six months old. However, the Court agrees with the Government that the allegations in the affidavit were not stale because the affidavit established probable cause to believe that Gray's criminal activity was ongoing and committed through his various phone lines, including his business lines. Just as this Court rejected Onuwar's staleness argument, so too it rejects Gray's.

Although Defendant Gray suggests that the information is stale because it is more than six months old, no arbitrary time limit applies to determining staleness. *See United States v. Greene*, 250 F.3d 471, 480-81 (6th Cir. 2001); *United States v. Henson*, 848 F.2d 1374, 1382 (6th Cir. 1988), *cert. denied*, 488 U.S. 1005 (1989). Instead of "measuring staleness solely by counting the days on a calendar, courts must also

concern themselves with the following variables: the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), the place to be searched (mere criminal forum of convenience or secure operational base?)." *United States v. Harris*, 255 F.3d 288, 299 n.3 (6th Cir. 2001).

Turning to this case, the Court concludes that the allegations in the July 2002 affidavit were not stale. The affidavits allege ongoing criminal activity, including wire fraud and money laundering. Allegations of ongoing criminal activity, as here, "will generally defeat a claim of staleness." *United States v. Greene*, 250 F.3d at 481. The things being seized were the conversations about ongoing business transactions. The place to be searched were long-term facilities, namely a business allegedly operating as a long-term center of corruption, which constitutes a secure operational base. After considering these variables, the Court concludes that the affidavit for the July 2002 application was not stale.

Moreover, Gray claims that the July 2002 interceptions should be suppressed because the affidavit contained a significant falsehood. The affidavit alleges that on February 6, 2002, Gilbert Jackson told Gray that "I had to bribe the Mayor's office." Gray contends that Jackson actually said "a broad in the Mayor's office." Gray argues that this so-called falsehood, which was contained in the affidavit, warrants suppression of the interceptions. The Government disputes Gray's interpretation of the phone call, contending adamantly that Gray's translation that Jackson referred to "a broad" is

incorrect. However, the Government admits that Jackson's word was unclear, and it instead suggests that Jackson referred to a "boy" in the Mayor's office. Regardless of whether Jackson referred to a "boy" or a "broad" in the Mayor's office, the remaining context of the intercepted communication substantially supports a finding of probable cause that Jackson bribed the official in the Mayor's office. For example, Jackson stated twice that he would "flip it to him." Thus, the Court finds that, despite the possible inaccurate translation of one word in the affidavit, the remaining context of the interception provided a substantial basis that probable existed that Gray co-conspired with Jackson to bribe a public official.

Thus, based upon the totality of the circumstances, the Court finds that the record includes a substantial basis for concluding that probable cause existed. Defendant Gray's argument fails.

2. *Necessity,* 18 U.S.C. § 2518(1)(c)

Defendant Gray claims that the applications contained only a conclusory statement of necessity. Gray contends that other investigative techniques were available to the Government, and that no factual basis supported the statement for the necessity of the electronic surveillance.

In contrast, the Government argues that the affidavits for the January 2002 and July 2002 applications include detailed information concerning other investigatory techniques that have been tried or failed. The affidavit explained why traditional techniques were insufficient for this investigation. The Court concludes that the Defendant's argument fails.

Title III requires that the government's interception application include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518 (1)(c). In showing the necessity of electronic surveillance, the Government need not prove that it has exhausted every conceivable investigative method. *See United States v. Alfano*, 838 F.2d 158, 163 (6th Cir. 1988). The purpose of the necessity requirement "is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques." *United States v. Stewart*, 306 F.3d 295, 304 (6th Cir. 2002); *see also United States v. Corrado*, 227 F.3d 528, 539 (6th Cir. 2000). The issuing judge has "considerable discretion" in deciding whether other investigative methods might be successfully employed. *United States v. Landmesser*, 553 F.2d 17, 20 (6th Cir. 1977).

Turning to this case, the Defendant's arguments are insufficient to disturb the issuing judge's finding that the application displayed the necessity of electronic surveillance pursuant to Section 2518(1)(c). For example, Gray speculates regarding other possible investigatory methods, such as arguing that the Government should have used Garland Hardeman to prod Gray for information about bribing Monique McGilbra. Gray further argues that CS-2 should have obtained more information. Neither of these arguments warrants suppression. At best, Gray's arguments are haphazard hunches as to conceivable other

investigatory methods. However, given the considerable discretion accorded to the issuing judges, this Court will not disturb the findings that the January 2002 and July 2002 affidavits demonstrated the necessity of electronic surveillance for this investigation.

Gray further argues that the ability of a confidential informant to access Gray cannot be the basis for maintaining that other techniques would fail. However, Gray's argument lacks merit.

E. Minimization Requirement

Gray also argues that the Government failed to comply with the minimization requirement under 18 U.S.C. § 2518(5) in the January 2002 and July 2002 orders and that the Court should suppress *all* intercepts under 18 U.S.C. § 2518(10)(a)(iii). As evidence, he submitted eighteen intercepted conversations from the first thirty days of the wiretap. None of the examples submitted by Gray involve intercepted conversations that the Government indicates that it will use at trial. Gray asserts that many of the intercepted communications were non-pertinent, including subjects such as private matters, health of family, and personal problems. As an alternative to complete suppression, Gray requested time to review all intercepted conversations "in order to demonstrate the failure to minimize properly."

In contrast, the Government argues that the monitoring agents complied with the minimization requirements. Even if the monitoring agents failed to minimize non-pertinent communications, the Government contends that the appropriate remedy is

to suppress only the conversations that the Government failed to minimize and not all interceptions.

Title III requires the government to conduct electronic surveillance "in such a way as to minimize the interception of communications not otherwise subject to interception." 18 U.S.C. § 2518(5). Minimization is accomplished when the interception of non-pertinent calls had been adequately avoided. To assess minimization efforts, the Court conducts "an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time." *Scott v. United States*, 436 U.S. 128, 136 (1978); *United States v. Feldman*, 606 F.2d 673, 677-78 (6th Cir. 1979). Title III "does not forbid the interception of all non-relevant conversations, but rather instructs the agents to conduct the surveillance in such a manner as to 'minimize' the interception of such conversations." *Scott*, 436 U.S. at 140. Thus, the "government is held to a standard of honest effort; perfection is usually not attainable, and is certainly not legally required." *United States v. Uribe*, 890 F.2d 554, 557 (1st Cir. 1989).

Initially, the Government must make a prima facie showing of reasonable minimization. *See United States v. Willis*, 890 F.2d 1099, 1102 (10th Cir. 1989). Then, the burden shifts to the defendant to show that more effective minimization was possible. *Willis*, 890 F.2d at 1102. As to the defendant's burden, "[i]t is not enough for defendants to identify particular calls which they contend should not have been intercepted; they must establish a pattern of interception of innocent conversations which developed over the period of the wiretap." *United States v. Lawson*, 780 F.2d 535, 540

(6th Cir. 1985). If the defendant fails to meet this burden, the Court will deny the motion to suppress, even if the defendant has identified isolated instances where the Government failed to minimize non-pertinent conversations. *See, e.g., United States v. Armocida*, 515 F.2d 29, 45 (3d Cir. 1975).

As examples of communications that the Government failed to minimize, Defendant Gray identifies twelve conversations in his brief, and he submitted recordings of eighteen conversations to the Court.[11] The Government counters that these

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[11] Some of the conversations discussed in Gray's brief were included on the CD submitted at the suppression hearing as Defendant Exhibit B:

(1) January 16, 2002, fourteen minute call to Shelton Richardson, who was the sitting mayor of the City of North Randall, Ohio, discussing his medical condition. The Government contends that investigating agents believed that Gray had improper contact with Shelton, and they discuss other public officials.

(2) January 17, 2002, thirty-six minute conversation with Terri Davis about her family. The Government maintains that Gray discusses his business opportunities in Houston, with call waiting call from Gray's father, and they discuss business matters, including three councilmen who are in financial trouble.

(3) January 17, 2002, Gray and his ex-wife, Annette Gray, discussed their children, music and sports lessons, and other personal matters for five minutes. The Government contends that Gray's finances, including expenditures, are pertinent to the ongoing investigation.

(4) January 31, 2002, Gray and his father discussed sports. The Government maintains that Gray and his father discussed former Mayor White.

(5) February 1, 2002, nineteen minute conversation with his girlfriend, Valerie, about personal matters. The Government contends that Gray discusses a trip that he is planning with the

communications exhibit how Gray intermingled personal and business matters. The Government contends that seven of the calls were relevant to the overall investigation, four of the calls involve Gray speaking with or about a public official that the FBI has reason to believe that he bribed, and three were less than two minutes (making minimization impossible). The Government concludes that at most, Defendant Gray identified two calls that were "arguably non-minimized."

Clerk of Courts for Cuyahoga County before his conviction and incarceration for theft from office.

(6) February 1, 2002, 2:28 minute conversation between Gray and Valerie discuss personal matters. The Government contends that minimization was not possible.

(7) February 10, 2002, four minute conversation between Gray and Valerie discussing personal matters. The Government contends that minimization was impossible because Gray and Valerie usually discuss business matters.

(8) August 1, 2002, when Nina Upshaw, Gray's office manager, orders lunch. Defendant contends that the interception lasted 17 minutes, but the Government maintains that it lasted 1:13 minutes.

(9) October 1, 2002, thirty-one minute conversation between Gray and sitting City of Cleveland Councilman Zack Reed discussing council meetings and convicted public officials.

(10) November 18, 2002, ten minute conversation between Nina Upshaw and Valerie discussed sending flowers to someone recovering from triple bypass surgery.

(11) February 2, 2003, fifteen minute call between Gray and his father.

(12) a two-minute call between Cassandra, Alexis, and Michael Robinson.

1. Prime Facie Showing

The Court finds that the Government has made a prima facie showing that it made reasonable efforts to minimize the interception of non-pertinent calls. The Court finds that the monitoring agents managed the wiretap in an objectively reasonable manner, took precautions not to overreach, and typically minimized non-pertinent conversations as was practicable.

In establishing a prima facie case, the Government need not show good faith efforts to minimize. *E.g.*, *Scott v. United States*, 436 U.S. 128, 145-46 (1978). An officer's subjective motivation is relevant only after a violation is found to determine whether to impose an exclusionary sanction. The reasonableness of the Government's efforts to minimize is a question of fact. When the Government believes that a person is a member of the conspiracy, interception does not violate the minimization requirement. *See United States v. Malekzadeh*, 855 F.2d 1492, 1496 (11th Cir. 1988) (holding that interception of marital communications did not violate the minimization requirement when the investigators believed that the defendant's wife was involved in the conspiracy), *cert. denied*, 489 U.S. 1029 (1989).

Turning to this case, the Court examines several factors in assessing whether the Government accomplished minimization, including (1) the nature and complexity of the suspected crimes, including the alleged scope of criminal activity; (2) the thoroughness of the government's precautions to bring about minimization; and (3) the degree of judicial supervision over the surveillance process. *E.g.*, *United States v. Feldman*, 606 F.2d 673, 678 (6th Cir. 1979). After

reviewing the circumstances of the interceptions, the Court finds sufficient evidence that the Government conducted reasonable efforts to minimize the interception of non-pertinent communications.

As to the nature and complexity of suspected crimes, more extensive surveillance is warranted when the alleged scope of criminal activity is broad, even though this increases the risk of intercepting nonpertinent communications. *See Scott*, 436 U.S. at 140. Furthermore, courts require less efforts to minimize communication between known co-conspirators. *See United States v. Torres*, 908 F.2d 1417, 1424 (9th Cir. 1990). Finally, courts tolerate "more extensive surveillance in conspiracy cases, particularly narcotics conspiracies." James Carr, 1 *Law of Electronic Surveillance* § 5:20.

When the investigation involves a conspiracy, courts permit more surveillance, especially if the case involves a large conspiracy with several levels and unidentified participants than an investigation of a single incident with a small number of known participants. *See United States v. Earls*, 42 F.3d 1321, 1325 (10th Cir. 1994). The investigation further increases in complexity when targets use ambiguous language, making it difficult to determine whether the conversation relates to criminal activity. *See United States v. Ozar*, 50 F.3d 1440, 1447 (8th Cir. 1995), *cert. denied*, 516 U.S. 871 (1995); *United States v. Bennett*, 219 F.3d 1117, 1124 (9th Cir. 2000) (recognizing that with "guarded or coded language, a higher rate of nonrelevant intercepted calls should be expected because it takes longer to figure out the meaning of a particular call"), *cert. denied*, 531 U.S. 1056 (2000). Finally, when the phone line has a call-waiting feature,

officers may have to listen for a longer time to determine if the speaker or conversation has changed. James Carr, 1 *Law of Electronic Surveillance* § 5:20.

Turning to this case, the Court finds that the suspected crimes are complex, which warrants more surveillance. This case involves allegations of a large conspiracy with unidentified participants and several separate transactions happening in different cities. Another circumstance hampering the investigation is the sheer volume of phone calls made. In the first thirty days, 4,569 conversations were intercepted. 417 were considered to be pertinent to the authorized objectives. Aff. Clyde E. Wallace, III, ¶ 44 (July 30, 2002). Ultimately, more than 48,000 wire or oral communications were intercepted from these applications. Furthermore, at least Gray's cellular phone had a call waiting feature, which could require agents to listen longer to determine if the speaker is changed. Moreover, the Government contends that Gray was involved in legal activities of lobbying and illegal activities of bribing public officials, which further increases the complexity of the investigation because it is more difficult to determine whether a conversation involves criminal activity. The nature and complexity of suspected crimes in this case suggest that more extensive surveillance was warranted.

The percentage of non-pertinent calls intercepted is one factor for the Court to consider. However, the Supreme Court observed that the percentage of non-pertinent calls may be high, yet the interception reasonable because of other factors, including the length of the call or the usage of ambiguous, coded language. *See Scott*, 436 U.S. at 139-40; *see also United States v. O'Connell*, 841 F.2d 1408, 1417 (8th Cir.

1988), *cert. denied*, 488 U.S. 1011 (1989). In the first thirty days, nearly seven percent of calls (300 calls of 4300) were minimized. Other courts have found no violation of the minimization requirement, even when the Government intercepted all conversations over an extensive time period. *See United States v. Abascal*, 564 F.2d 821, 827 (9th Cir. 1977). This is admittedly a low percentage of minimization, which suggests that the monitoring agents failed to comply with minimization. However, the Government argues that these numbers are misleading because many of the intercepted calls were less than two minutes in length. The Government contends that calls of less than two minutes cannot be minimized because an agent must listen to the first few minutes of a conversation to determine whether it is pertinent.

In this case, the Government observed that more than 3300 of 4300 calls intercepted in the first 30 days were less than two minutes in length, contending that a call of two-minute duration is impossible to minimize. The Court finds that a two-minute period is a reasonable time frame to determine whether the communication is relevant. For example, based upon the eighteen calls submitted to the Court, between ten and thirty seconds elapsed on some calls before someone picked up the phone. Under these circumstances, monitoring during the first two or three minutes to determine the relevance of the call satisfies the minimization requirement. *See United States v. Losing*, 560 F.2d 906, 909 n.1 (8th Cir. 1977), *cert. denied*, 434 U.S. 969 (1977).

The Court also considers the amount of judicial supervision over the interception. In this case, judicial supervision was more than adequate, which suggests

that the agents complied with the minimization requirements. *See Feldman*, 606 F.2d at 678. Each agent received a copy of the instructions regarding minimization. Before interception began, the attorneys and FBI personnel, including all monitoring agents, discussed procedures for minimizing non-pertinent communications. Both the January 2002 and July 2002 orders required minimization.[12] The monitoring agents submitted progress reports to keep the district court informed of the status of the interception.

In view of these circumstances, the Court concludes that the Government has established a prima facie showing that its minimization efforts were objectively reasonable.

2. Pattern of Intercepting Non-Pertinent Conversations

Since the Court found that the Government established a prima facie case, the burden shifts to Gray to show a pattern of intercepting non-pertinent conversations. Gray has not met this burden.

The Court finds that the Defendant has only identified isolated instances where the agents intercepted non-pertinent conversations. In arguing

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[12] In the January 2002 order, the "monitoring of wire communications shall be limited to those communications relevant to the pending investigation, in accordance with the minimization requirements of Chapter 119 of Title 18, United States Code." Under the July 2002 order, monitoring should "be conducted in such a way as to minimize the interception and disclosure of the communications intercepted to those communications relevant to the pending investigation."

that the Government failed to minimize, Gray has identified at most eighteen conversations. The interceptions at issue present no pattern of insufficient minimization. Although Gray identified twelve communications of 48,000 that the Government reportedly failed to minimize, he wholly failed to "establish a pattern of interception of innocent conversations which developed over the period of the wiretap." *Lawson*, 780 F.2d 535, 540 (6th Cir. 1985). Based upon the large volume of phone calls occurring during the surveillance periods, the Court finds that agents' failure to minimize is sporadic at most. Assuming that some non-pertinent conversations were not minimized, Defendant has not established a pattern of intercepting non-pertinent conversations.

Even if the monitoring agents failed to minimize every non-pertinent conversation, this does not warrant the drastic remedy that Defendant Gray seeks. At most, this would warrant suppression of the non-pertinent conversations. *See United States v. Baltas*, 236 F.3d 27, 32 (1st Cir. 2001) ("[E]rrors in minimizing one particular interception . . . do not automatically warrant the suppression of all the evidence."), *cert. denied*, 532 U.S. 1030 (2001). The First Circuit observed that "in a particularly horrendous case, total suppression may be . . . an appropriate solution," but the court also noted that the "sweeping relief" of complete suppression is not warranted absent a showing of "taint upon the investigation as a whole." *United States v. Hoffman*, 832 F.2d 1299, 1307 (1st Cir. 1987) (internal quotation marks omitted). Despite Gray's contentions, sporadic failure to minimize does not warrant suppressing all intercepts. The Government has stated that it does not

intend to introduce any of the calls that Gray identified.

Defendant asserts that the Government's so-called failure to minimize warrants suppression of *all* the intercepts, but he fails to cite any cases that granted complete suppression. Instead, Gray cites two cases, *United States v. George*, 465 F.2d 772 (6th Cir. 1972); *United States v. Focarile*, 340 F. Supp. 1033 (D. Md. 1972). However, each of these occurred before the Supreme Court construed the minimization requirement in *Scott v. United States*, 436 U.S. 128 (1978). Additionally, *George* is not on point. In *George*, the Sixth Circuit suppressed the intercepts when the officers were never instructed which conversations to intercept and they did not receive a copy of the order, which is not the case here. *See United States v. George*, 465 F.2d 772 (6th Cir. 1972). Defendant Gray fails to demonstrate that suppression of all intercepts is warranted based upon the few instances where the agents intercepted nonpertinent conversations.

Thus, the Court finds that Gray failed to establish a pattern of intercepting non-pertinent phone calls. Defendant Gray is not entitled to the drastic remedy of complete suppression for the few isolated incidents where the agents failed to minimize non-pertinent conversations. Finally, the Court denies Defendant Gray's request for additional time to review all intercepted conversations. Gray had ample time through the several hearings on this motion to suppress to provide evidence to support his minimization argument.

F. Termination Requirement

Gray maintains that the Government failed to terminate its surveillance within a period sufficient to achieve the objectives of the surveillance.

An order approving a Title III intercept "must terminate upon attainment of the authorized objective, or in any event in thirty days." 18 U.S.C. § 2518(5). In this case, the Government admits that the extension orders for the interceptions obtained during February 2002 through May 2002 were deficient because the Government failed to obtain authorization from the Justice Department. Clearly, these extensions violated Title III. However, complete suppression is a drastic remedy is not appropriate in this case since the Government has self-suppressed the tainted intercepts obtained during the ninety-day period. The Government's self-suppression of the tainted materials sufficiently remedies the Title III violation. Further suppression is not warranted.

G. Disclosure Requirement

Gray claims, without legal support, that the Government failed to timely disclose surveillance after it ceased.

Title III requires notice to be served upon people named in an application within ninety days after surveillance ceases, including the fact of the entry of the order or application, the date that surveillance was authorized, and the whether communications were intercepted. 18 U.S.C. § 2518(8)(d). However, a post-interception failure to serve the notice and inventory cannot result in retroactively rendering the

interception unlawful. *See United States v. Donovan*, 429 U.S. 413, 439 (1977). Even if notice was not given until after the ninety-day deadline, suppression is not required unless the defendant shows actual prejudice arising from the delay. *See United States v. Rizzo*, 492 F.2d 443, 447 (2d Cir. 1974), *cert. denied*, 417 U.S. 944 (1974). A court will not presume or infer prejudice from the length of the time lapse involved. *United States v. Barletta*, 565 F.2d 985, 990 (8th Cir. 1977). Postponing service has been permissible where the Government has established a need to continue the investigation. *See United States v. Capra*, 501 F.2d 267, 277 n.10 (2d Cir. 1974).

In this case, Gray has failed to show that the Government failed to timely disclose the surveillance to Gray. Moreover, even if Gray showed that disclosure was untimely, he could not establish resulting prejudice. The Court rejects Gray's argument concerning disclosure.

IV. CONCLUSION

For the foregoing reasons, the Court DENIES with prejudice Defendant Gray's motion to suppress all Title III intercepts.

IT IS SO ORDERED.

Dated: June 6, 2005 */s/ James S. Gwin*
JAMES S. GWIN
UNITED STATES
DISTRICT JUDGE

APPENDIX D

18 U.S.C. § 2515

Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter [18 USCS §§ 2510 et seq.]

18 U.S.C. § 2518(1)(a), (4)(d) and (10)(a)

Procedure for interception of wire, oral, or electronic communications.

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter [18 USCS §§ 2510 et seq.] shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

* * *

(4) Each order authorizing or approving the interception of any wire, oral, or electronic communication under this chapter [18 USCS §§ 2510 et seq.] shall specify--

* * *

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application;

* * *

(10) (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any wire or oral communication intercepted pursuant to this chapter [18 USCS §§ 2510 et seq.], or evidence derived therefrom, on the grounds that--

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter [18 USCS §§ 2510 et seq.]. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

* * *

18 U.S.C. § 1951.

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15 [15 USCS § 17], sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45 [45 USCS §§ 151-188].

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 08-792

In the Supreme Court of the United States

NATHANIEL GRAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. 2510-2521, requires suppression of evidence derived from a court-authorized wiretap, where the wiretap application was approved by a statutorily designated official but the application and order failed to state that fact.

2. Whether the evidence was sufficient to support petitioner's convictions for conspiring with public officials to extort, and aiding and abetting public officials' extortion of, "property from another * * * under color of official right," in violation of the Hobbs Act, 18 U.S.C. 1951.

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In the Supreme Court of the United States

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NATHANIEL GRAY, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-59a) is reported at 521 F.3d 514. The opinion of the district court (Pet. App. 60a-101a) is reported at 372 F. Supp. 2d 1025.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 2008. A petition for rehearing was denied on July 17, 2008 (Pet. App. 1a-2a). On October 10, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including December 14, 2008, and the petition was filed on December 15, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted on one count of conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(d); three counts of conspiring to obstruct interstate commerce by extortion, in violation of 18 U.S.C. 1951(a) (the Hobbs Act, 18 U.S.C. 1951); 12 counts of obstructing interstate commerce by extortion, in violation of the Hobbs Act; and 20 counts of mail and wire fraud, in violation of 18 U.S.C. 1341, 1343, and 1346. Petitioner also pleaded guilty to one count of income tax evasion, in violation of 26 U.S.C. 7201. Pet. App. 6a-7a. He was sentenced to 180 months of imprisonment, to be followed by three years of supervised release. *Id.* at 8a. The court of appeals reversed petitioner's convictions on three of the Hobbs Act extortion counts, affirmed petitioner's convictions on the remaining counts, and remanded for resentencing. *Id.* at 1a-59a. On remand, the district court sentenced petitioner to 180 months of imprisonment, to be followed by three years of supervised release. Am. J. 3-4 (Sept. 24, 2008).

1. a. Petitioner operated a consulting business that represented companies interested in obtaining municipal contracts. Beginning in the mid-1990s, petitioner funneled cash and gifts from firms he represented to public officials, in return for their steering contracts to petitioner's clients. Pet. App. 5a-6a.

Petitioner provided the mayor of East Cleveland, Emmanuel Onunwor, with monthly cash payments funded by entities seeking to obtain or retain contracts with the city. Petitioner approached Onunwor about finding

municipal work for one of his clients, Ralph Tyler Company (RTC), a Cleveland engineering firm. After Onunwor replaced the company that had an existing city contract with RTC, and began awarding engineering contracts to RTC, petitioner increased the amount of his monthly payments to Onunwor. Pet. App. 39a-41a.

Another engineering firm, CH2M Hill (CH2M) contracted with East Cleveland to run the city's water department after petitioner arranged for CH2M representatives to meet with Onunwor. CH2M paid RTC, which had no involvement in the water contract, a monthly fee for "consulting services," and RTC passed the payments directly to petitioner's consulting company. After the city contracted with CH2M, petitioner again increased his payments to Onunwor. Pet. App. 41a-42a.

Onunwor also informed partners of a law firm that had contracted to perform tax collection services for the city that if they wanted to keep the contract, they needed to work with petitioner. The law firm entered into a "consulting agreement," under which the firm made monthly payments to petitioner. Pet. App. 40a-41a.

Petitioner also received monthly payments from Honeywell Corporation, which was interested in being hired as a subcontractor on a Houston energy contract. Using funds supplied by Honeywell, petitioner provided Monique McGilbra, the Houston official who oversaw the energy contract, with money and gifts in exchange for her assistance in ensuring that Honeywell was retained as a subcontractor and received payments under the contract. Pet. App. 42a-46a.

b. In January 2002, Assistant United States Attorney (AUSA) David Sierleja applied, pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, for an order authorizing interception

of conversations to and from several business and cellular telephone numbers used by petitioner. Deputy Assistant Attorney General (DAAG) John Malcolm, a Justice Department official designated to review and approve wiretap applications, had authorized the application. The application did not state that it had been approved by a Justice Department official, however, and did not include a copy of the authorization letter. A federal district judge, Judge Oliver, issued an order authorizing the wiretap for a 30-day period. Like the application, the order did not refer to the official Justice Department authorization for the wiretap. Pet. App. 11a, 61a-62a, 64a.

2. After being indicted, petitioner moved to suppress evidence obtained from the wiretap on the ground, *inter alia*, that "the order of authorization * * * under which it was intercepted [wa]s insufficient on its face." 18 U.S.C. 2518(10)(a)(ii). See Pet. App. 66a-67a. As relevant here, petitioner contended (*id.* at 73a-74a) that the government had failed to comply with 18 U.S.C. 2518(1)(a) and (4)(d), which require the wiretap application and order to include "the identity of * * * the officer authorizing the application." 18 U.S.C. 2518(1)(a); see 18 U.S.C. 2518(4)(d).

The district court held a hearing at which AUSA Sierleja testified that, when he applied for the wiretap in January 2002, he told Judge Oliver that he had obtained authorization from a Justice Department official designated to approve wiretap applications. When he met with Judge Oliver, AUSA Sierleja had DAAG Malcolm's authorization letter with him, but he did not show it to Judge Oliver. Pet. App. 13a, 64a-65a, 73a-81a.

The district court denied the suppression motion. Pet. App. 60a-101a. The court found that DAAG Mal-

colm had approved the application before it was submitted to Judge Oliver and that "Judge Oliver had notice that a specially-designated official approved the application." *Id.* at 76a. The court concluded that those circumstances "sufficiently fixed responsibility with the Justice Department," and thus served the statutory purpose of "ensur[ing] accountability by a high-level executive official." *Id.* at 78a. Stating that it was unable to "discern any resultant prejudice" to petitioner from the violations of the statutory identification requirements, *id.* at 80a, the court concluded that the failure to identify any authorizing official in the application and order did not, on the facts of this case, warrant suppression of the wiretap evidence. *Id.* at 73a-81a.

As noted above, after a jury trial, petitioner was convicted of multiple counts of violations of RICO, conspiracy to obstruct and obstruction of interstate commerce by extortion in violation of the Hobbs Act, and mail and wire fraud. He also pleaded guilty to one count of income tax evasion. Pet. App. 4a. The district court sentenced him to 180 months of imprisonment, to be followed by three years of supervised release. *Id.* at 8a.

3. The court of appeals reversed three of petitioner's Hobbs Act convictions, affirmed his other convictions, and remanded for resentencing. Pet. App. 3a-59a.

a. As relevant here, the court held that the failure of the wiretap application and order to identify the authorizing official did not require suppression of evidence derived from the wiretap. Pet. App. 15a-23a. Noting that DAAG Malcolm "had authority to, and did in fact, authorize" the application, *id.* at 21a. and that Judge Oliver had notice of the authorization before he issued the order, *id.* at 22a, the court held that petitioner was not prejudiced by the government's "breach of a re-

quirement that does not 'occupy a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance.'" *Id.* at 22a-23a (quoting *United States* v. *Chavez*, 416 U.S. 562, 578 (1974)).

b. Petitioner contended, *inter alia*, that the evidence was insufficient to support his convictions under the Hobbs Act, 18 U.S.C. 1951. Pet. App. 34a-52a. The Hobbs Act makes it unlawful to "obstruct[], delay[], or affect[] commerce * * * by * * * extortion," or to "conspire[] to do so." 18 U.S.C. 1951(a). Section 1951(b)(2) defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

While petitioner's appeal was pending, Pet. App. 34a, the Sixth Circuit issued its decision in *United States* v. *Brock*, 501 F.3d 762 (2007). In *Brock*, private citizens who bribed a public official were convicted of conspiring with the official to extort their own property "under color of official right," in violation of the Hobbs Act. *Id.* at 764-767. The Sixth Circuit reversed, holding that "[t]o be covered by the statute, the alleged conspirators * * * must have formed an agreement to obtain 'property from *another*,' which is to say, formed an agreement to obtain property from someone outside the conspiracy." *Id.* at 767. The court also observed that "[w]hile the definition of extortion 'under color of official right' correctly extends to public officials who *accept* a bribe when there is a quid pro quo for the payment, neither the Supreme Court nor our court has construed the statute to cover private individuals who *offer* a bribe to public officials." *Id.* at 768 (citations omitted). The court stated, however, that private individuals may be convicted of "violating the Hobbs Act when they con-

spire with public officials or aid and abet them in an extortion scheme," *id.* at 768-769, based on proof that the scheme involved "the obtaining of property of another, with his consent." 18 U.S.C. 1951(b)(2).

In supplemental briefing, petitioner argued that *Brock* required reversal of his Hobbs Act convictions because the government failed to prove that he conspired with public officials to obtain, or aided and abetted public officials in obtaining, "property from another"—*i.e.*, from a third party. Pet. App. 38a-39a.

Applying *Brock* (Pet. App. 34a-39a, 52a), the court of appeals affirmed petitioner's convictions on the Hobbs Act counts involving payments to Onunwor. *Id.* at 39a-42a. Citing the "overwhelming evidence that [petitioner's] monthly cash payments to Onunwor were funded by entities seeking to obtain or retain contracts with the city," *id.* at 40a, the court held that petitioner "conspired with, and aided and abetted, Onunwor's extortion of 'property from another, with [their] consent,' by funneling payments from [petitioner's] clients, seeking municipal contracts, to Onunwor while he was acting under color of official right." *Id.* at 42a. The court also affirmed petitioner's Hobbs Act convictions involving gifts to Houston official McGilbra, *id.* at 42a-47a, finding that "the evidence showed that the payments and privileges bestowed upon McGilbra did not originate with" petitioner. *Id.* at 47a. Rather, petitioner's "corporate clients, seeking government contracts, funneled the illegal payments through [petitioner] to McGilbra." *Ibid.* The court reversed petitioner's convictions on three other Hobbs Act counts, concluding that the government had failed to prove that the payments to public officials came from another. *Id.* at 47a-50a, 52a.

ARGUMENT

1. Petitioner contends (Pet. 4-16) that the omission of the authorizing official's identity from the wiretap order rendered the order facially insufficient and required suppression of evidence derived from the wiretap. No further review is warranted.

a. The court of appeals' decision is correct. This Court has made clear that "suppression is not mandated for every violation of Title III." *United States* v. *Chavez*, 416 U.S. 562, 575 (1974). "To the contrary, suppression is required only for a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *United States* v. *Donovan*, 429 U.S. 413, 433-434 (1977) (quoting *United States* v. *Giordano*, 416 U.S. 505, 527 (1974)).

In *Chavez*, the Court held that suppression was not required even though the wiretap application and order "did not correctly identify the individual authorizing the application, as 18 U.S.C. § 2518(1)(a) and (4)(d) require," 416 U.S. at 570, because the Attorney General had in fact authorized the application. *Id.* at 571-573. The Court contrasted its holding with that in *Giordano*, where it held that wiretap evidence must be suppressed because the application was "in fact, not authorized by one of the statutorily designated officials." 416 U.S. at 508; see *Chavez*, 416 U.S. at 571. Unlike the requirement that only certain officials "responsive to the political process" authorize wiretap applications, *Giordano*, 416 U.S. at 520, which was a "critical precondition" to any judicial order, *id.* at 516, the requirements that the authorizing official be identified in the wiretap applica-

tion and order merely serve a "reporting function," *Chavez*, 416 U.S. at 579, and were not intended "to occupy a central, or even functional, role in guarding against unwarranted use" of wiretaps. *Id.* at 578.

Although the wiretap order in *Chavez* identified, albeit incorrectly, a qualified official as the person who authorized the application, 416 U.S. at 573-574, the Court's reasoning suggests that where a statutorily designated official has in fact authorized a wiretap application, failure to comply with "reporting procedures," *id.* at 573, that do not play a "substantive role * * * in the regulatory system" does not warrant suppression of the wiretap evidence. *Id.* at 578-579. Here, the district court found that AUSA Sierleja "actually received authorization from a specially-designated Justice Department official" before submitting the wiretap application, Pet. App. 65a, 77a, and the district court judge was apprised of that authorization before he issued the wiretap order, *id.* at 65a, 78a. See *id.* at 21a (affirming district court's factual findings). The court of appeals thus correctly concluded that the failure of the application and order to identify the authorizing official did not undermine the "essential safeguards of Title III," *id.* at 22a, and that suppression of the evidence was unwarranted, *id.* at 23a.

b. In accord with the decision of the court of appeals in this case, other circuits have held that not every facial insufficiency of a wiretap order requires suppression of evidence obtained pursuant to that order. See *United States* v. *Radcliff*, 331 F.3d 1153, 1162 (10th Cir.) ("[Section] 2518(10)(a)(ii) does not require suppression if the facial insufficiency of the wiretap order is no more than a technical defect.") (quoting *United States* v. *Moore*, 41 F.3d 370, 374 (8th Cir. 1994), cert. denied, 514 U.S. 1121

(1995), and citing cases from the Third, Fifth, Sixth, Seventh, and Ninth Circuits), cert. denied, 540 U.S. 973 (2003). Thus, courts have concluded that suppression is not warranted when a wiretap order either mistakenly identifies a Justice Department official who could not legally authorize the wiretap, or— as in this case— identifies no official at all, so long as a statutorily designated official actually gave the authorization. See *United States* v. *Callum*, 410 F.3d 571, 576 (9th Cir.) (failure to identify any approving official in wiretap order is "a minor insufficiency for which suppression is not the appropriate remedy"), cert. denied, 546 U.S. 929 (2005); *Radcliff*, 331 F.3d at 1163 ("facial insufficiency" of wiretap orders in failing to identify specific individuals who approved application was a "technical defect that did not disrupt the purposes of the wiretap statute or cause any prejudice" to the defendant); *United States* v. *Fudge*, 325 F.3d 910, 918 (7th Cir. 2003) (same); *United States* v. *Lawson*, 545 F.2d 557, 562-563 (7th Cir. 1975) (facial insufficiency of application indicating approval by official not statutorily authorized to approve wiretaps was "too technical to require suppression" where Attorney General actually approved application), cert. denied, 424 U.S. 927 (1976); *United States* v. *Swann*, 526 F.2d 147, 149 (9th Cir. 1975) (per curiam) (same); *United States* v. *Acon*, 513 F.2d 513, 516-519 (3d Cir. 1975) (same).

Petitioner contends (Pet. 4, 9-15), however, that the decision in this case conflicts with the Ninth Circuit's decision in *United States* v. *Staffeldt*, 451 F.3d 578 (2006). In *Staffeldt*, the Ninth Circuit held that suppression was required where the wiretap application identified the authorizing official by reference to an attached letter that authorized a wiretap application in an unrelated case from a different district, and the district court

issued the wiretap order with the same unrelated authorization letter attached. *Id.* at 579-581. The court recognized that "[n]ot every facial insufficiency in an application requires a court to suppress the wiretap evidence." *Id.* at 584 (quoting *Acon*, 513 F.3d at 517). It nevertheless concluded that suppression was warranted on the particular facts of that case because the application "fail[ed] to show that it was authorized at all by the Justice Department: All that a judge can tell from reviewing it is that an application to wiretap another person was approved." *Ibid.* The court distinguished its earlier decisions in *Swann* and *Callum* on the ground that those cases involved only "the *identity* of the authorizing official, not * * * the fact of authorization itself." *Id.* at 585.

Although the United States disagrees with the Ninth Circuit's decision in *Staffeldt*, the decision below does not implicate any conflict with the Ninth Circuit. As noted above (pp. 9-10, *supra*), the Ninth Circuit in *Callum* held that suppression was not warranted when (as here) the facial insufficiency in the order is that it "list[s] no official at all." 410 F.3d at 576. And, as the court below concluded (Pet. App. 22a n.3), *Staffeldt* is "readily distinguishable" here: "Judge Oliver had notice that a qualified 'specially designated' official had approved the application before his perusal and approval of the order." *Id.* at 22a; see *id.* at 77a-78a. Thus, the courts below concluded that "the omission of that information from the application and order could not have affected the decision to grant the wiretap." *Id.* at 22a n.3; see *id.* at 78a-80a.[1]

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[1] Contrary to petitioner's suggestion (Pet. 14-15), the court of appeals did not conclude that AUSA Sierleja's statement to the district

2. Petitioner also contends (Pet. 5-6, 17-34) that this Court should grant review to resolve a conflict in the circuits as to the proof required to convict a private individual of conspiring with or aiding and abetting a public official in committing extortion "under color of official right," in violation of the Hobbs Act. Resolution of any conflict would not benefit petitioner, however, because he agrees with the standard adopted by the court of appeals. Further review is not warranted.

In *United States* v. *Brock*, 501 F.3d 762 (2007), the Sixth Circuit held that private citizens who pay bribes to public officials—whether they are "perpetrators, acquiescors, [or] victims" in the bribery scheme—may not be convicted under the Hobbs Act of conspiring to extort their "own property," with "their own consent." *Id.* at 768-771. In so holding, however, the court reaffirmed that private individuals may be prosecuted for "violating the Hobbs Act when they conspire with public officials or aid and abet them in an extortion scheme," so long as the "'property from another' and 'with his consent' requirements" are satisfied. *Id.* at 768-769 (citing *United States* v. *Collins*, 78 F.3d 1021, 1032 (6th Cir.), cert. denied, 519 U.S. 872 (1996), and *United States* v. *Kelley*, 461 F.3d 817, 826 (6th Cir. 2006)).

As petitioner notes (Pet. 18-30), other courts of appeals have concluded that a private citizen may be prosecuted under the Hobbs Act for bribing a public official if the "payor's conduct constitutes sufficient activity beyond the mere acquiescence of a victim" of an extor-

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court was "sufficient to fix the facial insufficiencies" in the wiretap application and order. The only question before the court was whether the government's "admitted noncompliance" with the identification provisions warranted suppression of the wiretap evidence. Pet. App. 15a, 22a-23a.

tion scheme. *United States* v. *Spitler*, 800 F.2d 1267, 1278 (4th Cir. 1986); see, *e.g.*, *United States* v. *Cornier-Ortiz*, 361 F.3d 29, 40 (1st Cir. 2004) (affirming Hobbs Act conviction of private citizen who "did more than merely acquiesce" in extortion scheme); *United States* v. *Tillem*, 906 F.2d 814, 823-824 (2d Cir. 1990) (reversing Hobbs Act conviction where government failed to prove that defendant "promoted the conspiracy and had a stake in its outcome"). While the Sixth Circuit in *Brock* rejected a "dichotomy" between "perpetrators" and "victims" of extortion schemes, 501 F.3d at 770-771, it also noted that "the primary debate" in decisions from other circuits "did not concern the 'property from another' requirement" that the court interpreted in *Brock*. *Id.* at 770-771. No other court of appeals has yet considered the Sixth Circuit's holding in *Brock*. Thus, even if the disagreement otherwise warranted this Court's attention, review would be premature.

In any event, this case would be a poor vehicle for that review because petitioner already has received the benefit of the Sixth Circuit's narrow reading of the Hobbs Act. The court of appeals applied its rule from *Brock* to reverse three of petitioner's Hobbs Act convictions. See Pet. App. 34a-50a; *id.* at 52a (government "did not meet [its] burden" under *Brock* with respect to three of the counts on which petitioner was convicted). That is precisely the rule that petitioner now contends is "correct." Pet. 30; see Pet. 34 (*Brock* "states the most workable and statutorily supported rule"). Petitioner—who was undoubtedly a "perpetrator," rather than a "victim," of the extortion schemes involving Onunwor and McGilbra—would not have fared better under the

decisions he cites from other circuits.[2] Accordingly, this case does not present an appropriate vehicle for resolving any conflict among the circuits.

Petitioner disagrees (Pet. 30, 32) with the court of appeals' application of *Brock* to his case, but that fact-bound issue does not warrant this Court's review. As the court of appeals concluded (Pet. App. 39a-47a), there was ample evidence that petitioner aided and abetted public officials' extortion schemes by funneling bribes from third parties. In any event, any tension between the Sixth Circuit's decision in this case and its earlier decision in *Brock* would be a matter for that court to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

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[2] Petitioner contends (Pet. 30-32) that his conduct was "factually indistinguishable" from that in *Tillem*, in which the Second Circuit reversed the Hobbs Act conviction of a defendant who "operated as a conduit through which" public officials extorted money from businesses. 906 F.2d at 823. The Second Circuit emphasized, however, that there was no evidence that the defendant in *Tillem* participated in the extortion scheme and "had a stake in its outcome." *Ibid.* In contrast, as the court of appeals concluded with respect to the convictions it affirmed, petitioner was actively involved here. See Pet. App. 34a-47a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 08-792

In The
Supreme Court of the United States

NATHANIEL GRAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

1. Whether an application and order for a Title III wiretap that completely fails to notify the issuing judge that the application had been approved by any specially designated Department of Justice official requires a court to comply with the statutorily authorized suppression remedy or whether it can refuse to comply on the basis of vague, extra-record assurances years after the wiretap order was issued and does such a refusal to suppress affect the fulfillment of the reviewing or approval functions required by Congress?

2. Does the Hobbs Act prohibition on "extortion under color of official right," 18 U.S.C. § 1951, permit the prosecution of private persons, under a conspiracy or aider and abettor theory, as extortion perpetrators, acquiescors, or victims, or does it punish none of them and is the conflict in the circuits caused by the expansion of the Hobbs Act to include conduct not covered by the statute?

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REPLY BRIEF FOR PETITIONER

1. The Sixth Circuit's decision in the present case is in direct conflict with the Ninth Circuit's decision in the correctly decided United States v. Staffeldt, 451 F.3d 578 (9th Cir. 2006). The suggestion by the Government that there is no conflict fails to address the resolution of the single issue in both cases and the identical facts supporting the disparate rulings by each Circuit. In addition, the Government fails to address the broader conflict and confusion between the circuits as to what errors in the presentation of an application and the issuance of a Title III order are considered a "minor technicality."

Instead of addressing the conflict, the Government, in its Brief in Opposition, chose to argue the merits of the case. The issue presented in this Petition is that the application presented to and order issued by the judge in Stafeldt is virtually identical in its insufficiencies to those at issue in the instant case. The Ninth and Sixth Circuits came to conflicting conclusions about the insufficiencies in both the application and the order. The holding in Stafeldt is consistent with the statute and Supreme Court precedent. The Sixth Circuit's decision conflicts with both the statute and Supreme Court precedent.

In Stafeldt, the Ninth Circuit received an application and order with no indication of the identity of the authorizing individual or whether, in fact, approval had been received at all. The application stated in general terms that a "duly designated Justice Department official had authorized the request for the wiretap sought in the application. To substantiate this assertion, the application then stated that attached

was a copy of a 'Memorandum of Authorization approving this application' as well as a copy of the Attorney General's order of special designation." Staffeldt, 451 F.3d at 581. However, the attached letter from the Department of Justice ("DOJ") was unrelated to the Stafeldt case and referred instead to another matter entirely. Similarly, in the case presently in front of this Court (herein referred to as "Gray"), there was no indication from the application or order (there were no attachments to either) of either the identity of the authorizing official or that the application for a wiretap had been approved by *anyone* at the Department of Justice ("DOJ"), let alone a properly authorized individual.[1]

The Government fails to appreciate that in everyone of the cases it cites as consistent with the Sixth Circuits decision with Gray, save Stafeldt, the issuing judge was presented with notice in the application, either in the body or in an attachment, that the application had been approved by a properly designated Justice Department official. That single fact permitted the issuing judge to perform the mandated function of insuring compliance with this essential component of legislation governing an order permitting the interceptions at issue. The applications

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[1] It is undisputed in this case that the issuing Judge was provided with no documentation indicating that the application had been approved by anyone at the DOJ. Contrary to the Government's suggestion, the issuing Judge was never provided with any notice that a properly designated official approved the application. The Government relies solely upon an unsworn, casual conversation between the AUSA and the issuing Judge wherein the Judge was told that the "OEO" reviewed the application and that ultimately there was some sort of approval.

and orders in Stafeldt and Gray did not permit the issuing judge to determine compliance with this component, yet, each Court issued a different holding as to whether the statutorily mandated remedy of suppression was required for this failure to comply with the statute.

The Stafeldt Court found that suppression was the only remedy because the facial insufficiency made it impossible for a judge to conclude from the face of the application that the wiretap had been authorized by the appropriate person at the DOJ or, in fact, authorized by any person. Despite the fact that the same is true with regard to the application and order submitted to the issuing Judge in the case *sub judice*, the Sixth Circuit upheld the denial of suppression on the ground that the failure of the application and order to even speak to approval of the application was a minor insufficiency not warranting suppression.

In direct contrast to the Sixth Circuit, the Ninth Circuit in Stafeldt determined that "[b]ecause a wiretap application that has not been authorized by the DOJ cannot support the issuance of a wiretap order, the failure of the application to show that it had been authorized cannot be considered minor." Staffeldt, 451 F.3d at 579. The Court determined that a "wiretap application is facially sufficient if, on the basis of the information that appears on its face, it could reasonably be believed that it meets all the statutory requirements, including the requirement that a duly empowered Justice Department official authorize the application for the particular wiretap being sought, and thus that the wiretap is warranted. If not, the application or order is deemed facially insufficient." Id. at 582. Looking at the Stafeldt

wiretap application, it would be impossible for a judge to "conclude from the face of the application, including the attached memorandum of authorization, that the request for the Staffeldt wiretap had been authorized by the Justice Department", so the order was facially insufficient. Id. at 582. "As a result, a reading of the application would preclude a determination that all the statutory requirements for approving a wiretap of Staffeldt's telephones had been met." Id. at 583. The Court went onto to determine that this was not a minor insufficiency because the approving Judge could not determine from the application, order or attached letter that the application was approved by a properly authorized DOJ official. This holding is diametrically opposed to the holding by the Sixth Circuit at issue in Gray.

The Stafeldt Court recognized that judicial approval was obviously at the core of the congressional purposes underlying this statute. "The statutory scheme created by Congress relies on a uniquely rigorous bifurcated system of authorization involving review and approval by both the executive and judicial branches." Id. at 580.

The insufficiencies at issue here and in Stafeldt are nearly identical. In fact, the application and order in Stafeldt provided more information than those at issue in the case *sub judice*. Neither the application, the order or any attachments to either in Gray made any mention of whether the application had been approved by *any* DOJ official or identified that approval had been obtained, let alone included the identity of the authorizing individual. There was absolutely no information in the application or order here that related to this critical information to a judge's

determination of whether the issuance of the application was warranted. That is, that the wiretap has been authorized by the appropriate person at the DOJ. As in Stafeldt, the application is facially insufficient in that it fails to show that it was authorized at all by any DOJ official. Here, unlike Stafeldt, the application and order provided the issuing Judge with no indication or information whatsoever that any approval had been received from the DOJ. The application does not even contain the general terms that a "duly designated Justice Department official had authorized the request for the wiretap sought in the application." Because the Supreme Court has recognized "that Justice Department authorization is a 'critical pre-condition' to the approval of a wiretap application,...the absence of [authorization] clearly is "likely to affect the judge's determination that a wiretap is or is not warranted.'" Id. at 584 (quoting United States v. Giordano, 416 U.S. 505, 515-516 (1974)). The facial insufficiency at issue in the instant case is indistinguishable from the insufficiency in Staffeldt. The Ninth Circuit's holding that the insufficiencies cannot be considered minor and that suppression was required is in direct conflict with the Sixth Circuit's holding in Gray.

2. The various cases cited by the Government do not establish that this issue has been resolved or that the Sixth Circuit's decision is in line with the majority of circuits. The Government cites to various cases that state that a minor insufficiency does not require suppression. Neither Petitioner nor the Ninth Circuit in Staffeldt disagrees with that general proposition. However, in none of the cases cited (other than Stafeldt) is there a complete failure of the requirement of Title III applications and orders to identify whether

the application had been approved by a properly designated DOJ official or received any approval at all. Further, it is misleading to claim that the issues presented in this Petition have long been resolved in the Government's favor. Both the District Court in Gray and the Ninth Circuit have noted that the Supreme Court has not ruled on the issue presented in this Petition. See United States v. Gray, Case No. 1:04CR580 (Northern District of Ohio), June 6, 2005 Opinion, p. 13, "The Supreme Court has not resolved the issue presented in this Case."; United States v. Callum, 410 F.3d 571, 574 (9th Cir. 2005) ("the Supreme Court has not yet decided a case involving a facially insufficient warrant under section 2518(10)(a)(ii)...")

The Brief in Opposition contains a discussion of United States v. Radcliff, 331 F. 3d 1153 (10th Cir.). In Radcliff, the order authorizing the wiretaps failed to identify the person from the DOJ who authorized the application. However, the application named the correct individual and the order listed by title every Department of Justice official with legal authority to authorize an application. The Court found this to be an insufficient order because the "general language fails to specify the identity of any person at all--anyone holding any title identified in the wiretap order could have been the person who authorized the wiretap applications." Radcliff, 331 F. 3d 1162. Despite this insufficiency, the 10th Circuit held that § 2518(10)(a)(ii) does not require suppression because the Judge could clearly tell from the application that proper authorization had been given by the DOJ. The language of the application and order "did not subvert [Congress'] purpose" and the issuing judge was able to determine the DOJ official's identity. Id. at 1163. *Also*

cited by Government, see United States v. Fudge, 325 F.3d 910 (7th Cir. 2003) (The application for the wiretaps and the wiretap orders failed to identify the authorizing government official but the application asserted that the Attorney General authorized this application and copies of the Attorney General's order of special designation and the memorandum of authorization approving the Application were attached to the application. The application, with attachment, and order indicated that the application was authorized by a duly designated official. The Court noted that attaching the authorization letter "tested the boundaries of complying with statutory provisions." The Seventh Circuit indicated that it was because the order specifically noted that authorization was made pursuant to a power delegated by the Attorney General that the order did not violate any substantive requirement of Title III. Therefore, the clear implication is that an order that fails to name any authorizing official or whether there even was authorization would require suppression and, thus, the holding is in conflict with Gray.); United States v. Lawson, 545 F.2d 557 (7th Cir. 1975) (The authorization was signed by a different person than who approved the application. Both the order and application indicated that it was authorized.)

The Government also cites to three other cases that it claims support the Sixth Circuit here. Those cases again are easily distinguishable from the instant case and Stafeldt and include language that demonstrates that their holdings conflict with the Sixth Circuit. The first of those cases is United States v. Acon, 513 F.2d 513 (3rd Cir. 1975). The wiretap authorization letters were signed by an acting assistant attorney general but actually approved by the Attorney General. Id. at

514. As noted in Stafeldt, the Court in Acon explained "whether a facial insufficiency is minor relates to the 'distinction[s] in the kinds of information which must be supplied to the approving judge. Suppression is merited only when the facially insufficient information is 'likely to affect the judge's determination that a wiretap is or is not warranted.'" Stafeldt, 451 F.3d at 584 (quoting Acon, 513 F.2d at 517). As the facial insufficiency at issue in Gray and Stafeldt precluded the ability to determine who approved the application and *if any* approval was received, the holding by the Sixth Circuit is in conflict with Acon. As held in Stafeldt, this is clearly likely to affect the judge's determination of whether to approve a wiretap. The language in Acon supports Petitioner's claim that there is a profound conflict between the circuits.

The same holds true for United States v. Swann, 526 F.2d 147 (9th Cir. 1975), which relied upon Acon. This is one of many cases where the Attorney General had approved the application but the application indicated that another individual had provided that approval. The Court found, consistent with Chavez v. United States, 416 U.S. 562 (1974), that this was only a minor insufficiency. Id. at 149. In Stafeldt, the Ninth Circuit pointed out that the applications in Swann were insufficient on their face with respect only to the *identity* of the Justice Department official who authorized the applications. Staffeldt, 451 F.3d at 584-585 "[T]he applications did not, on their face, prevent the reviewing judge from determining whether authorization for the particular wiretaps requested had been obtained at all. Swann did not suffer from a facial insufficiency comparable to that of the application [in Stafeldt]. The obtaining of authorization for the particular wiretap is a

significantly more important factor in the judge's determination of whether the wiretap is warranted than the identity of the authorizing official." Id.

The Government also cites United States v. Callum, 410 F.3d 571 (9th Cir. 2005) for the proposition that failing to identify the DOJ source was not a substantial impairment of Congressional purpose. In Callum, neither the application nor the order included the identity of the authorizing individual at the DOJ but Ninth Circuit concluded that suppression was properly denied because the written DOJ authorization letter was part of the application for the wiretap. The letter contained the necessary information to enable the judge to determine that the application was approved. Despite the fact that the letter was part of the application and that the letter contained the necessary information, the Court went onto to say that it was ruling "*[u]nder the force of precedent*" and went on to note that "Title III is an exacting statute obviously meant to be followed punctiliously..." Callum, 410 F.3d at 579. Stafeldt again explains that the facial insufficiencies at issue in Callum are not similar to those in the instant case. When a DOJ memorandum of authorization for a wiretap is with the application, the memo is part of the application. The facial insufficiency at issue in Callum "related to the *identity* of the authorizing official, not to the fact of authorization itself." Stafeldt, 451 F.3d at 584. The Court went onto to note that both Callum and Swann simply hold that "when the facial insufficiency relates exclusively to the identity of the authorizing official, that insufficiency is minor and does not require suppression." Id.

Contrary to the Government's suggestion the case at issue here is also in conflict with, decisions made by this Court. Both Chavez v. United States, 416 U.S. 562 (1974) and United States v. Giordano, 416 U.S. 505 (1974) found the documents at issue there to be facially sufficient so the review was under § 2518(10)(a)(i) not § 2518(10)(a)(ii). Giordano cautions that "[p]aragraphs (ii) and (iii) [of § 2518(10)(a)] must be deemed to provide suppression for failure to observe some statutory requirements that would not render interception unlawful under paragraph (i)." Giordano, 416 U.S. at 527. Further, when discussing § 2518(10)(a)(i), both cases state that suppression is required under § 2518(10)(a)(i) when there is a failure to enable the issuing judge to determine whether those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device have been satisfied. Giordano, 416 U.S. at 527. In both Giordano and Chavez, this Court found it significant that with an incorrect identification, a judge examining the application and order on its face could reasonably believe that a duly empowered DOJ official had in fact authorized the wiretap request." Giordano, 416 at 525 n.14.

The conflict between the circuits on the issue presented here is clear and profound. The circuits differ in the application of § 2518(10)(a)(ii) to the failure to identify in either the application or order whether any proper authorization was obtained from the DOJ.

3. The second issue presented in Mr. Gray's Petition involves the confusion and conflicts among the circuits on the attempt to use the Hobbs Act prohibition on extortion to punish the bribery of state officials. That confusion has predated Justice Scalia's recognition of it in United States v. McCormick, 500 U.S. 257 (1991).

> ...where the United States Code explicitly criminalizes conduct such as that alleged in the present case, it calls the crime bribery, not extortion -- and like all bribery laws I am aware of (but unlike § 1951 and all other extortion laws I am aware of) it punishes not only the person receiving the payment but the person making it.
> Id. 278-280.

Mr. Gray relies upon his presentation in the Petition on that issue.

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IN THE

Supreme Court of the United States

NATHANIEL GRAY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether an application and order for a Title III wiretap that completely fails to notify the issuing judge that the application had been approved by any specially designated Department of Justice official requires a court to comply with the statutorily authorized suppression remedy or whether it can refuse to comply on the basis of vague, extra-record assurances years after the wiretap order was issued and whether such a refusal to suppress affects the fulfillment of the reviewing or approval functions required by Congress?

2. Does the Hobbs Act prohibition on "extortion . . . under color of official right," 18 U.S.C. § 1951, permit the prosecution of private persons, under a conspiracy or aider and abettor theory, as extortion perpetrators, acquiescors, or victims, or does it punish none of them and is the conflict in the circuits caused by the expansion of the Hobbs Act to include conduct not covered by the statute?

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in assuring that statutory requirements for the issuance of all warrants, especially those involving wiretaps, are fully met. The underlying decision here permits *post hoc* justification that undermines not only the statute, but confidence in the integrity of important procedures intended to protect against invasive scrutiny of our confidential

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both parties received timely notice of *amicus curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

communications. The Sixth Circuit's flawed rationale consequently has opened a significant split with other circuits that should be resolved in favor of Petitioner.

REASONS FOR GRANTING THE PETITION

ARGUMENT

Wiretap applications and orders that do not identify the authorizing official on their face or otherwise (such as in an appendix) violate Title III's plain statutory language. 18 U.S.C. §§ 2518(1)(a) and 2518(4)(d) require the wiretap application and order to *list* the authorizing officer. An application or order missing the authorizing officer is therefore facially insufficient and offers no indicia that the application is authorized at all. Where the listing requirement is not met, Title III unambiguously requires suppression. See 18 U.S.C. § 2518(10)(a)(ii) (evidence must be excluded when "the order of authorization or approval under which it was intercepted is insufficient on its face"). With respect to exclusion, § 2518(10)(a) thus "provides the remedy for the right created by section 2515" and it is "intended to be comprehensive." S. Rep. No. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2195.

Applications and orders lacking the authorizing official altogether are unlike applications which misidentify the authorizing official. This Court recognized as much in *United States* v. *Chavez*, when it said: "We cannot say that misidentification was in any sense the omission of a requirement that must be satisfied if wiretapping or electronic surveillance is to be lawful under Title III." 416 U.S. 562, 573 (1974). Applications and orders with misidentifications are "facially sufficient" because the applications apparently satisfy the statutory requirements.

United States v. *Giordano*, 416 U.S. 505, 525 n.14 (1974). A judge reviewing an application with a misidentified authorizing official can reasonably believe that the Department of Justice ("DOJ") has authorized the wiretap as required by 18 U.S.C. § 2516. *Id.* When, as here, no authorizing official is listed, no judge can reasonably find that the statutory requirements are satisfied.

Verbal communication that DOJ approval has been obtained cannot correct a facially insufficient application. *United States* v. *Staffeldt*, 451 F.3d 578, 583–84 & n.7 (9th Cir. 2006) (the government conceded that verbal communication of approval would not satisfy Title III); see also *United States* v. *Ford*, 414 F. Supp. 879, 884–85 (D.C. Cir. 1976) (Mem.), *aff'd*, 553 F.2d 146 (D.C. Cir. 1977). This type of evidence is irrelevant when determining whether an application or order is facially sufficient. See *Staffeldt*, 451 F.3d at 583–84. And even if it somehow were relevant, the events of this case demonstrate that reconstructing "parole evidence" many years after the fact is a risk-laden exercise. Pet. 12-14; *United States* v. *Gray*, 372 F. Supp. 2d 1025, 1031 (N.D. Ohio 2005). Such evidence may be relevant when determining if an interception was lawful under 18 U.S.C. § 2518(10)(a)(i), but this Court has recognized that § 2518(10)(a)(i) is different from § 2518(10)(a)(ii). "[P]aragraph[] (ii) . . . must be deemed to provide suppression for failure to observe some statutory requirements that would not render interceptions unlawful under paragraph (i)." *Giordano*, 416 U.S. at 527. The statutory language in paragraphs (ii) is much less ambiguous than the language used in paragraph (i). Compare 18 U.S.C. § 2518(10)(a)(i) ("the communication was unlawfully intercepted") with *id.* § 2518(10)(a)(ii) ("the order of

authorization or approval under which it was intercepted is insufficient on its face"). Extrinsic evidence thus will never be necessary to determine whether or not an application or order is valid on its face.

Informational omissions that directly and substantially affect the courts' statutory duties require suppression of the tainted evidence under § 2518(10)(a)(ii). Failure to list the authorizing official in the wiretap application or order is not a minor or technical insufficiency. "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *Giordano*, 416 U.S. at 515. Identification of the authorizing official in the application "facilitates the court's ability to conclude that the application has been properly approved" under 18 U.S.C. § 2516. *Chavez*, 416 U.S. at 575. Identification in the court's order "fix[es] responsibility" for the source of primary approval. *Id.* In omission cases, the court can perform neither of these functions.

Misidentifying a properly authorized official in a wiretap application or order is minor because the reviewing court can still perform its statutory duties. The court can conclude that a specified DOJ official has approved the wiretap applications and the court can fix responsibility with that official through the order approving the wiretap. *Giordano*, 416 U.S. at 525 n.14. These cases, however, are distinguishable from omission cases. Because a wiretap order cannot be issued without prior approval from the DOJ, the failure to list the authorizing official in the

application or order cannot be a minor facial insufficiency. *Staffeldt,* 451 F.3d at 579. Without this information, the court cannot perform its reviewing or approval functions. Accordingly, evidence obtained through a wiretap that fails to identify the authorizing official must be excluded under § 2518(10)(a)(ii).

Yet the rule announced by the Sixth Circuit in *Gray* allows the DOJ to circumvent one of the essential protections afforded to the public by Title III. By requiring law enforcement officials to explicitly authorize a wiretap prior to its execution, Title III decrees accountability in a process that by its very nature is open to abuse. Congress mandated accountability by, among other things, requiring that the "mature judgment of a particular, responsible Department of Justice official [be] interposed as a *critical precondition* to any judicial order." *Giordano,* 416 U.S. at 515–16 (emphasis added). It was also important to Congress that the responsible official is subject to the political process, which is not the case for either an Article III judge or for a federal law enforcement officer running an investigation. S. Rep. No. 90-1097, 1968 U.S.C.C.A.N. at 2185. Even as the number of officials who have the authority to sign off on a wiretap has expanded, the express intent of Congress to limit "such authority to identifiable officials in positions of trust" has been served. *United States* v. *Anderson,* 39 F.3d 331, 339 n.6 (D.C. Cir. 1994) (per curiam), *abrogated on other grounds by Richardson* v. *United States,* 526 U.S. 813 (1999).

The Sixth Circuit flouted this intent when it held that a wiretap application that completely omitted the authorization of an identifiable, authorized official should be treated like one that simply misidentified the responsible Department of Justice

official. Because this action violated plain statutory dictates and because the statute expressly provides a remedy, there can be but one result. Compare *Herring* v. *United States*, 129 S. Ct. 695, 700–01 (2009) ("[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] substantial social costs." (alterations in original) (quoting *Illinois* v. *Krull*, 480 U.S. 340, 352–53 (1987))). The Sixth Circuit's decision here thus warrants review, if not summary reversal. *Spears* v. *United States*, 129 S. Ct. 840, 845 (2009) (the Court "should therefore promptly remove from the menu the [Sixth] Circuit's offering, a smuggled-in dish that is indigestible").

Further, the Sixth Circuit's holding that the wiretap should not be excluded, simply because it turned out that a Justice Department official had authorized the wiretap, does not protect privacy interests as Title III intended. It does not apply the approval of an authorized Department of Justice official as a "critical precondition," *Giordano*, 416 U.S. at 515–16, but instead as a technical detail that can be fulfilled at any point before or after the wiretap is executed. The acceptance of *post facto* explanations that serve to rationalize the facial insufficiency of the wiretap application contravenes Congress' intent that both the judicial and executive branches approve a wiretap before it is executed. Should the Sixth Circuit's ruling stand, an important statutory barrier protecting the public's privacy would be weakened. Law enforcement officials would be able to obtain wiretap authorization subject only to judicial approval, knowing that they would be able to rationalize executive approval later, possibly based on information gleaned from the wiretap. The

approach taken by the Sixth Circuit substitutes a legal approach that respects these interests with a court-sanctioned policy of "shoot first and ask questions later."

While the exclusionary rule has been read into the Fourth Amendment, Congress felt that the protection of the public was sufficiently important to reiterate an exclusionary requirement here. The wiretap protections here are legislative creatures added to the existing exclusionary rule, and should be interpreted to reach beyond the exclusionary rule's typical protections. As Congress realized, wiretaps are unlike searches conducted at a business, residence, or in one's vehicle, because by their very nature they implicate privacy interests beyond those of the targeted individual. When a phone is tapped, the privacy of everyone to whom that individual speaks by phone—be they co-conspirators or simply people the target is interested in talking to—is compromised. While an *ex post facto* approach might eventually suppress illegally gathered evidence, the invasion of the privacy of the target of the investigation, and just as importantly, of any individual who may contact the target by phone, cannot be undone.

Here, for example, petitioner Nathaniel Gray operated a consulting business while this investigation took place. This business had contacts with a wide range of legitimate businesses and private individuals. Those individuals, and the employees and owners of those businesses, have a privacy interest in the communications they make with consultants and clients. Congress recognized the need to protect the public from wide-ranging intrusions into this privacy interest when it created a "uniquely rigorous" system requiring approval from

two separate branches of government. *Staffeldt*, 451 F.3d at 580 (citing *Giordano*, 416 U.S. at 515). By allowing a wiretap application facially supported by only one of these branches to stand, the Sixth Circuit circumvented the safeguards Congress explicitly enacted.

In addition, following the plain text of the statute would simplify the decisions courts and court officials have to make going forward. In cases like this one, courts following the Sixth Circuit's analysis must decide whether the DOJ authorized a wiretap, which can require extensive fact finding—including the existence of external documents and testimony of voice authorization, which would then be open to attacks by defendants on the grounds of *ex post* fabrication. This would encourage litigating even borderline cases, as dubious wiretap applications introduce enough uncertainty that prosecutors and defendants each find circumstances that support their case. The Court's reiteration of Congress' bright line rule requiring courts to find explicit assent on the application by an authorized DOJ official would simplify this process, eliminating much of the gray area currently surrounding the legality of wiretap applications. It would also establish clear expectations for the use of techniques that Congress deemed sufficiently invasive as to be a last resort.

The consequences of allowing a court to approve wiretaps without DOJ accountability are wide ranging. Wiretap requests by law enforcement and intelligence officials have increased by almost 60% between 1996 and 2006. U.S. Courts, *Authorized Intercepts Granted Pursuant to 18 U.S.C. 2519 as Reported in Wiretap Reports for Calendar Years 1996 2006*, http://www.uscourts.gov/wiretap/authorizedintercepts2006.pdf (last visited Feb. 9, 2009).

While not covered directly by Title III, FISA wiretap requests more than tripled between 1997 and 2007. Electronic Privacy Information Center, *Foreign Intelligence Surveillance Act Orders 1979–2007* (May 2, 2008), http://epic.org/privacy/wiretap/stats/fisa_stats.html. There is no indication that this trend will reverse itself, and advances in technology make it more likely, rather than less, that wiretaps will play a critical role in criminal investigations in the future. As these investigations take place, it follows that there will be disputes over the validity of wiretap applications. This Court now has the opportunity to ensure that Congress' explicit statutory directions are not degraded in general guidelines for those who wield this extraordinary and growing power, and establish guidelines the Justice Department and the judiciary can follow going forward.

This Court should now review the Sixth Circuit's decision in *Gray*. In doing so, it can reestablish the protections Congress intended to have in place for wiretapping procedures, and can ensure that the erosion of its precedent in *Giordano* is halted.

CONCLUSION

For these reasons, and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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